85-353

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHIGAN DIVERSIFIED BUSINESS PRODUCTS, INC., and MICHIGAN DIVERSIFIED BUSINESS CORP., d/b/a DANISH ADULT NEWS, d/b/a MEL-O-DEE RECORDS AND TAPES,

Appellants

vs.

CITY OF WARREN, GEORGE O. BRUGGEMAN and PATRICK J. SANKEUR,

Appellees.

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS

JURISDICTIONAL STATEMENT

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August 30, 1985

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QUESTION PRESENTED

Whether a municipality may regulate the location and operation of First Amendment protected businesses by requiring that special use approval be made prior to operation of such a business, and if so whether the standards set forth in the City of Warren's Zoning Ordinance, Sections 14.02, 20.07 and 21.06 sufficiently guide the special use decision making authority under the First and Fourteenth Amendments of the Constitution of the United States in ruling on special use applications by First Amendment protected businesses.

INDEX

	PAGE
Question presented	i
Opinions below	2
Jurisdiction	2
Constitutional provisions and ordinances	3
Raising the federal question	7
Statement of the case	8
The question is substantial	10
Conclusion	18
Appendix	1a

CITATIONS

Cases:

	PAGE
Blount v. Rizzi, 400 U.S. 410, 91 S.Ct. 423 (1971).	15
Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900 (1940)	14
Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673 (1976)	17
Entertainment Concepts, Inc. III v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), cert. denied 450 U.S. 919, 101 S.Ct. 1366 (1981)	12
Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734 (1966)	14
Gelling v. Texas, 343 U.S. 960, 72 S.Ct. 1002 (1952)	13
Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 88 S.Ct. 1298 (1968)	14
National Socialist Party v. Village of Skokie, 432 U.S. 43, 97 S.Ct. 2205 (1977)	15
15192 Thirteen Mile Road v. City of Warren, 593 F.Supp. 147 (E.D. Mich. 1984)	11
Schad v. Borough of Mount Ephraim, 452 U.S. 61, 101 S.Ct. 2176 (1981)	10, 17
Shuttlesworth v. City of Birmingham, 394 U.S. 147, 89 S.Ct. 935 (1969)	10, 12
Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239 (1975)	13, 14, 15
Staub v. Baxley, 355 U.S. 313, 78 S.Ct. 277 (1958)	13
Teitel Film Corp. v. Cusack, 390 U.S. 139, 88 S.Ct. 754 (1968)	15
United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673 (1968)	11

	PAGE
United States v. Thirty-Seven Photographs, 402 U.S. 363, 91 S.Ct. 1400 (1971)	15
Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440 (1976)	10, 17
Ordinances:	
City of Warren Zoning Ordinances:	
Section 14.02	1, 3, 7, 8, 9, 10, 11, 12, 14
Section 20.07	7, 10, 12, 13
Section 21.06	6, 9, 12, 13
Section 21.07	16
State Laws:	
Michigan Compiled Laws, Section 125.590, Michigan Statutes Annotated, Section 5.2940	16

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JURISDICTIONAL STATEMENT

Michigan Diversified Business Properties, Incorporated and Michigan Diversified Business Corporation, d/b/a Danish Adult News, d/b/a Mel-O-Dee Records and Tapes, the appellants, appeal from the final judgment of the Court of Appeals for the State of Michigan, dated August 16, 1984, holding that § 14.02 of the City of Warren's Zoning Ordinance is constitutional and not violative of appellants' right of free speech, equal protection and due process under the First and Fourteenth Amendments of the Constitution of the United States.

OPINIONS BELOW

The order of the Supreme Court of Michigan denying appellants' leave to appeal the final judgment of the Court of Appeals for the State of Michigan is not reported. It is reprinted in the appendix hereto, p. 62a., *infra.*

The opinion of the Court of Appeals for the State of Michigan is not reported. It is reprinted in the appendix hereto, p. 1a., *infra.*

Two opinions of the Circuit Court for the County of Macomb, State of Michigan, dated April 21, 1978 and September 20, 1982 are not reported. They are reprinted in the appendix hereto, pp. 8a. and 27a., respectively, *infra.*

JURISDICTION

The judgment of the Court of Appeals for the State of Michigan upholding the constitutionality of various provisions of the City of Warren's zoning ordinance and thereby finding appellants in violation of those same provisions was entered on August 14, 1984. See p. 1a., *infra.* A motion for rehearing was entertained and denied on October 4, 1984. See p. 6a., *infra.*

A notice of appeal of the Court of Appeals' ruling to the Supreme Court of Michigan was duly filed on October 22, 1984. The order of the Supreme Court of Michigan denying appellants' application for leave to appeal was entered on June 3, 1985. See p. 62a., *infra.*

A supplementary notice of appeal to this Court was duly filed in the Court of Appeals of Michigan, and a copy filed in the Court of Macomb County on or about August 30, 1985. See p. 59a., *infra.*

This appeal is being docketed in this Court within 90 days from the denial of appellants' application for leave to appeal below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND ORDINANCES

First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech . . .

* * *

Fourteenth Amendment, United States Constitution:

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

* * *

Section 14.02, City of Warren zoning ordinance:

14.02 USES PERMISSIBLE ON SPECIAL APPROVAL. Under such conditions as the Planning Commission, after hearing, finds the use not being injurious to the C-2 District and surrounding area and not contrary to the spirit and purpose of this Ordinance subject further to the review of the Board of Appeals and approval, thereof, the following uses may be permitted:

* * *

C. *Adult Businesses*—including but not limited to the following: Adult bookstores, adult motion pictures, adult mini motion pictures, nude body painting and modeling studios, and escort services.

1. *Definitions*

a) *Adult Bookstore.* An establishment having a substantial or significant portion of its stock in trade [sic],

books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Special Anatomical Areas", (as defined below), or an establishment with a segment or section devoted to the sale or display of such material.

b) *Adult Motion Picture Theatre.* An enclosed building with a capacity of 50 or more persons used for presenting material having a [sic] a dominant theme materials distinguished or characterized by an emphasis on matter depicting, describing or relating to "Special [sic] Sexual Activities" or "Specified Anatomical Areas", (as defined below), for observation by patrons therein.

c) *Adult Mini Motion Picture Theatre.* An enclosed building with a capacity for less than 50 persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "Specified Activities" or "Specified Anatomical Areas", (as defined below) or observation by patrons therein.

d) *Nude Body Painting or Modeling Studio.* An establishment which provides the services of body painting of the human body or (as defined below) are offered for observation of the patrons therein.

e) *Escort Services.* An establishment which provides the services of escorting members of the opposite sex for payment of a fee.

f) *Specified Sexual Activities, Specified Anatomical Areas.* For the purpose of this Section "Specified Sexual Activities" is defined as:

(1) Human genitals in a state of sexual stimulation or arousal.

(2) Acts of human masturbation, sexual intercourse or sodomy.

(3) Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

And, "Specified Anatomical Areas" is defined as:

(1) Less than completely and opaquely covered:

(a) human genitals, pubic region,

(b) buttock, and

(c) female breast below a point immediately above the top of the areola; and

(2) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

2. *Site Plan Review.*

Application to establish an adult business shall be made in writing to the Planning Commission. Such application shall specify the type of adult use or uses that will be catered to, and shall be accompanied by a detailed site plan.

The Planning Commission, having a duty to determine whether a particular use will have a deletrious [sic] effect on the surrounding area, will not approve a site plan application if any of the following conditions are found to exist:

a) The site is located on other than a major thoroughfare, as designated in the Master Thoroughfare Plan.

b) The site is closer than 500 feet to the property line of an area zoned residential or a residential use.

c) The site is located closer than 1,000 feet to a site having an adult business designation under this section or closer than 1,000 feet to the property line of any church or private school.

Any of the above restrictions may be waived if the Planning Commission finds that 51% of the persons owning, residing or doing business within 500 feet of this

location approve the use, that approval being evidenced by a petition with notarized signatures, signed by the concerned parties and presented by the petitioner prior to the public hearing.

Further, the site plan shall conform to the specifications as articulated in Section 21.07 of this ordinance and shall contain an elevation of the building and its layout shall be in such a fashion so as not to convey the message of its intended use.

* * *

Section 21.06, City of Warren zoning ordinance:

21.06. HEARINGS; MATTERS TO BE CONSIDERED. In making any recommendation or approval authorized by the provisions of this Ordinance, the City Planning Commission shall consider:

(a) Whether or not there has been a compliance with the provisions of this Ordinance.

(b) Whether or not there is proper yard space, parking facilities, loading space, percentage of lots coverage, green belts, size of buildings, lot area and other conditions required by this Ordinance.

(c) Whether or not the use involved is in accord with the spirit and purposes of this Ordinance.

(d) Whether or not the use involved would constitute a public or private nuisance.

(e) Whether or not the use involved would disturb or interfere with the natural or planned development of the surrounding neighborhood.

* * *

Section 20.07, City of Warren zoning ordinance:

20.07, STANDARDS. Whenever in this ordinance the lawful exercise or existence of a use requires the approval of the Board of Appeals, the Board shall be guided by the following standards:

1. Whether there is proper yard space, parking facilities, loading space and storage space to adequately carry on the use contemplated.

2. Whether the location and size of the proposed use, the nature and intensity of the principal use and all accessory uses, the site layout and its relation to streets giving access to it shall be such that traffic to and from the use or uses, and the assembly of persons in connection herewith, will not be hazardous or inconvenient to the neighborhood nor unduly conflict with the normal traffic of the neighborhood.

3. Whether or not the proposed use will have a detrimental effect on the health, peace, safety and welfare of persons residing in the surrounding neighborhood.

RAISING THE FEDERAL QUESTION

At an early stage in the proceedings the appellants raised the claim that Section 14.02 of the City of Warren zoning ordinance is unconstitutional under the First and Fourteenth Amendments to the Constitution of the United States. In response to the City of Warren's complaint alleging violation of certain City ordinances, the appellants filed a counter complaint seeking, inter alia, a declaratory judgment (and corresponding injunctive relief) that § 14.02 was unconstitutional under the First and Fourteenth Amendments, and a separate action for a writ of mandamus alleging the unconstitutionality of Section 14.02. The Circuit Court of Macomb County expressly ruled on the appellants claim in the opinion reprinted in the appendix at p. 27a., concluding that Section 14.02 was constitutional.

The appellants renewed their challenge to the constitutionality of Section 14.02 in their appeal to the Michigan Court of Appeals. The Court of Appeals, in its opinion, reprinted in the appendix at p. 1a, also expressly upheld the constitutionality of the ordinance.

The appellants again renewed their challenge to Section 14.02's constitutionality in their application for leave to appeal submitted to the Michigan Supreme Court. The Michigan Supreme Court's denial of leave to appeal effectively rejected the appellants' constitutional challenge to Section 14.02.

STATEMENT OF THE CASE

Michigan Diversified Business Properties, Inc., and Michigan Diversified Business Corp., d/b/a Danish Adult News, d/b/a Mel-O-Dee Records and Tapes, the appellants (collectively referred to herein as "Diversified") operate an "adult bookstore" within the corporate limits of the City of Warren, Michigan. Diversified's store features the sale, rental and display of sexually explicit, but non-obscene, books, magazines and films, and has remained open despite the judgments against them in the Michigan State Courts by virtue of an order by the Macomb County Court permitting the store to operate pending appeal of the judgment.

Appellee, City of Warren, (hereinafter referred to as "Warren") is a municipal corporation with jurisdiction over the premises occupied by Diversified. Appellee, George O. Bruggeman, was, at all times relevant to this cause, the Building Director of the City of Warren Building Department. Appellee, Patrick J. Sankeur, was, at all times relevant to this cause, the Assistant Building Director of the City of Warren Building Department. On information and belief, Mr. Sankeur is presently retired from his position, and the current Assistant Building Director is William Carr.

Warren instituted an action against Diversified in 1978 alleging various violations of city ordinances. Warren's frequently amended complaint alleged a number of occupancy and building code violations not relevant on this appeal. What is relevant is Warren's allegation that Diversified violated Section 14.02 of the Warren zoning ordinance by failing to obtain special use approval for the operation of their adult business. Diversified countercomplained, alleging that Section 14.02's special use requirement is unconstitutional under the First and Fourteenth Amendments to the Constitution of the United States. Diversified also challenged the constitutionality of Section 14.02 in a separate mandamus action against Warren and the appellees herein.

Diversified is located in a district classified C-2 by Warren. Under Section 14.02 of the Warren zoning ordinance, "adult businesses," as defined therein, are permitted to locate in C-2 districts, subject to certain distance requirements not here in issue, but only after special use and site plan approval are granted by the city. Diversified does not herein dispute that their operation is an "adult business" as defined by Section 14.02(c). Diversified has not obtained, nor has it sought, special use or site plan approval from Warren.

As adopted, Section 14.02 requires that all adult businesses wishing to locate in Warren first obtain special use and site plan approval. A special use request by an adult business requires a public hearing before both the Planning Commission and the Zoning Board of Appeals, and an adult business must obtain special use approval from *both* the Planning Commission and the Zoning Board of Appeals prior to operation.

The matters to be considered by the Planning Commission in making its decision concerning special use applications are contained in Section 21.06 of the Warren zoning ordinance, which is set forth above. Even a cursory examination of Section 21.06 reveals that the "matters to be considered" are *general*

guidelines and not specific procedures to follow. Indicative are the guidelines set forth in Subsections (c) through (e): whether or not the use involved (c) "is in accord with the spirit and purposes of this ordinance," (d) "would constitute a . . . nuisance," and (e) "would disturb or interfere with the natural or planned development of the surrounding neighborhood." Additionally, Section 20.07 contains the standards guiding the Board of Zoning Appeals, which participates jointly with the Planning Commission when an adult business seeks special use approval. Again the Zoning Board of Appeals' standards, which are set forth above, are in the nature of general guidelines rather than specific procedures. For example, the third standard is "whether or not the proposed use will have a detrimental effect on the health, peace, safety and welfare of persons residing in the surrounding neighborhoods."

THE QUESTION IS SUBSTANTIAL

The constitutional implications of requiring special use approval for the operation of a First Amendment protected business is novel and substantial. While this Court has ruled on the zoning of adult businesses, *Young v. American Mini Theatres,* 427 U.S. 50, 96 S.Ct. 2440 (1976) and *Schad v. Borough of Mount Ephraim* 452 U.S. 61, 101 S.Ct. 2176 (1981), and on the standards necessary for the licensing of constitutionally protected activity, *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 89 S.Ct. 935 (1969), this Court has yet to rule on the increasingly popular method used by Warren and a growing number of municipalities seeking to regulate adult businesses; the special use mechanism.

Contributing to the substantiality of the question herein presented is the divergence between the state and federal courts as to the constitutionality of the Warren ordinance. The Michigan state courts have upheld the constitutionality of Section 14.02. However, this same ordinance was attacked in

the United States District Court for the Eastern District of Michigan. In *15192 Thirteen Mile Road v. City of Warren,* 593 F.Supp. 147 (E.D. Mich. 1984) (reprinted in the appendix hereto at p. 37a.) the court granted the plaintiff's motion for preliminary injunction enjoining Warren's enforcement of Section 14.02 to adult bookstores (with the minor exception of those bookstores located in the City Center District, which issue is not present in this appeal) pending a full adjudication on the merits.[1] The federal court in *15192* at 156 specifically found that Section 14.02's special use procedure "leaves an improper degree of discretion in the local officials." The contrary rulings of the Michigan state courts and the federal court demonstrate the need for the Court to resolve this conflict.

Initially, the issue is whether any municipal ordinance which requires special use approval for the operation of a First Amendment protected business is constitutional. *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673 (1968) states a four part test for adjudging the constitutionality of a governmental regulation which incidentally impacts upon First Amendment interests. In the context of this appeal the fourth prong of the text is apposite; the incidental restriction on First Amendment freedoms must not be greater than is essential to furtherance of that interest. 391 U.S. at 377. Any legitimate governmental regulation of adult businesses can be accomplished by means less restrictive than the cumbersome process of requiring special use approval. For example, this Court found in *Young* that a pure zoning ordinance (with no special use requirement) served a legitimate governmental purpose and was constitutional. Why the additional requirement of special use approval need be added as an obstacle for potential adult business to surmount, as Warren requires, is inexplicable when

[1]Trial has been conducted in the *15192* case. However, on information and belief the District Court has not, as of the date of the filing of this jurisdictional statement, entered judgment.

this Court has already stamped its approval on the type of zoning regulation found in *Young*. See *Entertainment Concepts, Inc., III v. Maciejewski*, 631 F.2d 497 (7th Cir. 1980), cert. denied. 450 U.S. 919, 101 S.Ct. 1366 (1981), where at 504 the court "doubt[ed] that any special use scheme for regulation of adult movie theaters would be constitutionally valid because of the prior restraint involved." While this Court denied certiorari in *Maciejewski*, the present case and others like it demonstrate the importance of a full, careful consideration of the constitutionality of requiring special use approval for the operation of an adult business.

Assuming arguendo that in a proper case a municipality may require special use approval of adult businesses, the next issue is whether the standards set forth in Sections 21.06 and 20.07 sufficiently guide the decision-makers who must approve of the special use applications required under Section 14.02. In *Shuttlesworth v. City of Birmingham*, supra, this Court, in the licensing context, found the ordinance there in issue, which required a permit for the holding of any parade, procession or public demonstration on public property,

> "fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing or authority, is unconstitutional.[2]"

394 U.S. at 150, 151.

"[2] See *Lovell v. Griffin*, 303 U.S. 444; *Hague v. C.I.O.*, 307 U.S. 496; *Schneider v. State*, 308 U.S. 147, 163-165; *Cantwell v. Connecticut*, 310 U.S. 296; *Largent v. Texas*, 318 U.S. 418; *Jones v. Opelika*, 316 U.S. 584, 600 (Stone, C.J., dissenting), 611 (Murphy, J., dissenting), vacated and previous dissenting opinions adopted per curiam, 319 U.S. 103; *Marsh v. Alabama*, 326 U.S. 501; *Tucker v. Texas*, 326 U.S. 517; *Saia v. New York*, 334 U.S. 558; *Kunz v. New*

(Footnote continued on following page.)

In *Staub v. Baxley*, 355 U.S. at 322, the general rule was summarized as follows:

> "It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."

This same rule should apply with equal force in the special use context, where a denial of special use approval or a delay in processing an application imposes a real prior restraint on the unconstitutional rights of the applicant.

The factors to be considered by the Warren City Planning Commission and the standards guiding the Zoning Board of Appeals are stated in Sections 21.06 and 20.07 respectively and are set forth above. The holding of the Michigan Court of Appeals that sufficient guidance is therein given to the special use decision-makers is clearly erroneous. This Court has held similar general standards to be unconstitutional when applied to First Amendment protected activity. *Gelling v. Texas*, 343 U.S. 960, 72 S.Ct. 1002 (1952) (local authority authorized to deny a license for the exhibition of motion pictures which the authority was "of the opinion" was "of such a character as to be prejudicial to the best interests of the people of [the] City."); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239 (1975) (no written standards, but a license was denied for the exhibition of a play by local authorities because the production was not deemed to be "in the best interest of the

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(Footnote continued from preceding page.)

York, 340 U.S. 290; *Niemotko v. Maryland*, 340 U.S. 268; *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495; *Gelling v. Texas*, 343 U.S. 960; *Superior Films, Inc. v. Department of Education*, 346 U.S. 587; *Staub v. Baxley*, 355 U.S. 313; *Cox v. Louisiana*, 379 U.S. 536; *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676."

community."); *Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676, 88 S.Ct. 1298 (1968) ("suitable for young persons" defined as likely to incite or encourage delinquency, crime or sexual promiscuity). It requires merely an examination of the ordinances in question, and not a lengthy recitation of authority, to see that the Warren standards are not narrow, objective and definite, and hence effectively vest unbridled discretion in the hands of the special use decision-makers.

As alluded to above in the discussion of *Maciejewski,* the Court has yet to rule on whether the special use procedure, when impacting upon First Amendment protected activity, is a prior restraint. However, special use procedures generally, and Warren's specifically, satisfy the elements of prior restraint identified in *Southeastern,* 420 U.S. at 554 and *Cantwell v. Connecticut,* 310 U.S. 296, 305, 60 S.Ct. 900 (1940). These elements can be summarized as follows: (1) one seeking permission to operate was required to apply to the local authority (board), (2) the board was empowered to determine whether the applicant should be granted permission—in effect, a license or permit—on the basis of its review of the contents of the proposed use, (3) approval of the application depended upon the board's affirmative action, and (4) approval was not a matter of routine, instead involving the appraisal of facts, the exercise of judgment, and the formation of an opinion by the board. That the Warren special use procedure satisfies elements (1), (3) and (4) is self-evident. In addition, element (2) is satisfied, since the local authority must examine the contents of the proposed use to determine whether such use will be "injurious to the C-2 District and surrounding area and not contrary to the spirit and purpose" of the ordinance (Section 14.02) and whether the use "will have a deletrious [sic] effect on the surrounding area," (Sections 14.02(c)(2)).

Since a special use requirement as adopted by Warren is a prior restraint on protected speech, under authority of *Freed-*

man v. Maryland, 380 U.S. 51, 85 S.Ct. 734 (1966) and *Southeastern.* Warren's ordinance can only be constitutional if certain procedural safeguards are in place. As stated in *Southeastern,* 420 U.S. at 560:

> "We held in *Freedman,* and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards. *First,* the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second,* any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third,* a prompt final judicial determination must be assured."

(emphasis in the original). The *Freedman* safeguards have been repeatedly utilized to assure prompt determination is afforded where First Amendment rights are at issue. See, *United States v. Thirty-Seven Photographs,* 402 U.S. 363, 91 S.Ct. 1400 (1971); *Blount v. Rizzi,* 400 U.S. 410, 91 St.Ct. 423 (1971); *Teitel Film Corp. v. Cusack,* 390 U.S. 139, 88 S.Ct. 754 (1968). Neither *Freedman* nor *Southeastern* arise in the zoning/special use context, but nothing in either decision limits their scope to obscenity censorship. In fact, *Freedman* has been applied in other contexts; see *National Socialist Party v. Village of Skokie,* 432 U.S. 43, 97 S.Ct. 2205 (1977) (parade permit effectively denied group deemed offensive). However, the present case affords the Court the opportunity to affirmatively pronounce the *Freedman—Southeastern* requirements applicable to prior restraints arising in the zoning/special use context.

The Warren Zoning Ordinance lacks the procedural safeguards required by *Freedman* and *Southeastern* and hence is unconstitutional. The Warren ordinance requires an unsuccessful special use applicant to initiate judicial proceedings challenging the refusal. While normally a special use applicant, rather than the municipality, may properly have the burden of initiating further proceedings, where First Amend-

ment rights are involved *Freedman* and *Southeastern* clearly require that the municipality seek judicial approval of any action which results in a prior restraint on protected speech. Warren's ordinance hence fails the first part of the *Freedman—Southeastern* test.

The second *Freedman—Southeastern* requirement is that any restraint prior to judicial review be imposed only for a specified brief period. Among other things this requires that decisions on special use applications must be made within a specified short time period. Instead, the Warren ordinance specifies no time period whatsoever, short or otherwise, within which a ruling on special use applications must be made. The only mention of time is found in Section 21.07 which says that applications for special use must be approved or disapproved within a "reasonable time." This vague standard grants the decision-maker excessive discretion as to when it can rule on an application for special use, thereby violating *Freedman—Southeastern.* The danger of abuse when the special use authority has only an indefinite, ambiguous time standard to follow is patent. Specificity is essential to assure efficient and timely administration of special use applications.

Freedman and *Southeastern* also require assurance of a prompt final judicial determination. The Warren ordinance itself is silent on the issue of a final judicial determination. The Michigan Court of Appeals rejected Diversified's argument that a prompt final judicial determination was not assured by citing Michigan law providing for judicial review of a municipality's decision to withhold special use approval. See appendix, p. 4a., citing MCL 125.590; MSA 5.2940. However, the cited law merely states that:

> "Any party aggrieved by any order, determination or decision of any officer, agency, board, commission, board of appeals, or the legislative body of any city of village, made pursuant to the provisions of section 3a of this act may obtain a review thereof both on the facts and the law,

> in the circuit court for the county wherein the property involved or some part thereof, is situated: Provided, That application is made to the court within 30 days after delivery of a copy of such order, determination or decision, by certiorari or by any other method permissible under the rules and practices of the circuit courts of this state. On such review the courts shall have jurisdiction to make such further orders in respect thereof as justice may require. An appeal may be had from the decision of any circuit court or condemnation court to the supreme court in the same manner as provided by the laws of this state with respect to appeals from circuit courts: and in the event of such appeal, the issue of non-conformity may be reviewed as an issue of law in the supreme court."

While this statute may assure a judicial determination, a *prompt* determination is not assured. Time is essential when First Amendment rights are concerned, since deprivation of such rights for even a short period of time may be deemed irreparable. *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673 (1976). Merely providing for an aggrieved applicant to have access to the courts is insufficient; rather, an aggrieved applicant must have available an expeditious procedure which will with no, or minimal, delay consider his claim.

Justice Blackmun, in his concurring opinion in *Schad,* stated that he "would emphasize that the presumption of validity that traditionally attends a local government's exercise of its zoning power carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment." 452 U.S. at 77. Justice Powell, in his concurring opinion in *Young* warns against "using the power to zone as a pretext for suppressing expression . . . ", 427 U.S. at 84. Unfortunately, the lower courts, as exemplified in the present case, frequently fail to heed these admonitions. The time is ripe for a clear pronouncement of those parameters which municipalities must abide by when seeking to use their zoning power generally, and the special use mechanism specifically, to regulate First Amendment protected activity.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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August 30, 1985

APPENDIX

TABLE OF CONTENTS

		PAGE
1.	Opinion of the Michigan Court of Appeals	1a
2.	Order of the Michigan Court of Appeals Denying Motion for Rehearing	6a
3.	Opinion of the Circuit Court for the County of Macomb—April 21, 1978	8a
4.	Opinion of the Circuit Court for the County of Macomb—September 20, 1982	27a
5.	Trial Court Order Granting Permanent Injunction and Denying Request for Declaratory Judgment—December 6, 1982	33a
6.	Trial Court Judgment—June 29, 1983	35a
7.	Opinion of the United States District Court for the Eastern District of Michigan in *15192 Thirteen Mile Road v. City of Warren*, 593 F.Supp. 147 (1984)	37a
8.	Notice of Appeal	59a
9.	Order of the Michigan Supreme Court Denying Leave to Appeal	62a

Filed
August 16, 1984

STATE OF MICHIGAN

COURT OF APPEALS

CITY OF WARREN, a municipal corporation

Plaintiff-Appellee,

v.

MICHIGAN DIVERSIFIED BUSINESS PROPERTIES, INC.,

Defendant-Appellant.

No. 72495

MICHIGAN DIVERSIFIED BUSINESS CORP., d/b/a DANISH ADULT NEWS d/b/a MEL-O-DEE RECORDS AND TAPES,

Plaintiffs-Appellants,

v.

GEORGE O. BRUGGEMAN and PATRICK J. SANKUER, and CITY OF WARREN, a municipal corporation,

Defendants-Appellees.

No. 72496

Before: R.J. Danhof, C.J., T.M. Burns and T.C. Megargle,* JJ.

PER CURIAM

Appellant Michigan Diversified Properties operates a massage parlor/adult bookstore and other adult entertainment facilities within the City of Warren. Diversified did not request

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* Circuit judge sitting on the Court of Appeals by assignment

a special use approval pursuant to § 14.02 of Warren's zoning ordinance before operating these sexually oriented businesses. The City of Warren then brought suit to enjoin Diversified from operating these businesses. Diversified filed a counterclaim and a separate action for a writ of mandamus arguing that Warren's ordinance is unconstitutional. The trial court granted a permanent injunction restraining Diversified from operating adult businesses without obtaining special approval pursuant to § 14.02 of the City of Warren's zoning ordinance. Diversified appeals by right.

On appeal, Diversified argues that § 14.02 of Warren's zoning ordinance is an unconstitutional prior restraint on its First Amendment rights and also does not contain narrow, specific and objective criteria to guide the exercise of administrative decision making. We find appellant's arguments to be without merit. Section 14.02 of Warren's zoning ordinance is substantially similar to the Detroit zoning ordinance which was upheld by the United States Supreme Court in *Young* v *American Mini Theatres,* 427 US 50, 96 S Ct 2440; 49 L Ed 3d 310 (1976). In *Young,* the ordinance in question was imposed by the City of Detroit on adult bookstores, adult motion picture theaters, and adult mini-theaters. The ordinance provided that no adult entertainment facility could be located within 1000 feet of two other regulated uses and could not be placed within 500 feet of a residential area. These restrictions are identical to the restrictions found in Warren's ordinance. In finding that the ordinance furthered a substantial government interest, the Supreme Court noted that there was factual basis for Detroit's Common Council's conclusion that the zoning restriction would have the desired effect of reducing the problems with the number of undesirable transients, while protecting against a reduction in property values and an increase in crime. Moreover, the Supreme Court found that the ordinance was narrowly drawn to further the City's interest The Supreme Court concluded:

> "Since what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited, even though the determination of whether a particular film fits the characterization turns on the nature of its content, we conclude that the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures. We hold that the zoning ordinances require that adult motion picture theaters not be located within 1000 feet of two other regulated uses does not violate the Equal Protection Clause of the Fourteenth Amendment." 427 US 72-73[1]

Warren's interest in preserving the character of its urban areas is entitled to no less respect than Detroit's interest in preserving the quality of its neighborhoods. Consequently, the trial court's determination that the ordinance was constitutionally valid is adequately supported by the city's substantial governmental interest in protecting against urban blight.

Diversified also argues that the ordinance is invalid because there was no independent research conducted by the city which indicated that the ordinance was necessary to prevent urban decary. In *Genusa* v *City of Peoria*, 619 F2d 1203 (CA 7, 1980), the Court of Appeals for the Seventh Circuit found that "a legislative body is entitled to rely on the experience and findings of other legislative bodies as a basis for action". 619 F2d 1211. The City of Warren could, therefore, properly rely on Detroit's investigation into and experience with urban blight caused by adult oriented businesses.

Diversified further argues that the ordinance is invalid because it constitutes a prior restraint on free speech and fails to provide adequate procedural safeguards to prevent unwar-

[1] Justice Powell concurred finding that Detroit's ordinance did not suppress the production of, or restrict access to adult movies and the ordinance did not restrict the First Amendment freedoms any greater than was essential to the furtherance of the substantial government interest in preserving urban neighborhoods. 427 US 73.

ranted infringement of constitutionally protected speech. Contrary to Diversified's claims, the ordinance provides adequate guidelines for the determination of whether specified approval for the establishment of an adult business is to be granted. As the trial court correctly found:

> "Nor is the ordinance an unconstitutional prior restraint requiring a deciminator of protected speech to receive administrative approval prior to decimination of that speech. WCO 14.02(c)(2) and WCO 21.06 provides sufficient administrative standards by which the commission is to determine if approval is to be granted. See *Bruni* v *Farmington Hills*, 96 Mich App 664, 666; 293 NW2d 609 (1980). It would be impossible to require separate guidelines for approval because each site plan is different."

Diversified's final argument is that the ordinance is constitutionally invalid because it makes no provision for judicial review of the commission's refusal to grant an application for special approval. Contrary to Diversified's assertion, Michigan law provides for judicial review of a municipality's decision to withhold special use approval. MCL 125.590; MSA 5.2940. This statute affords courts with the power to determine the reasonableness of the exercise of police power under any municipal zoning ordinance. *Redford Moving and Storage Co* v *City of Detroit*, 336 Mich 702; 58 NW2d 812 (1953).

Section 21.07 of Warren's zoning ordinance requires that an application for special use must be approved or disapproved within a "reasonable time". Under the ruling in *Redford, supra*, the reasonableness of the length of the commission's deliberation is subject to judicial review. Considering the factors involved in determining whether a special use should be granted, the time standard set forth in § 21.07 is as specific as the circumstances allow. Consequently the ordinance is not rendered unconstitutional because of the absence of a specified period in which a site plan must be approved or disapproved.

We have carefully examined all of appellant's arguments and have found them to be without merit. The trial court is, therefore, affirmed.

/s/ ROBERT J. DANHOF
Robert J. Danhof

/s/ THOMAS M. BURNS
Thomas M. Burns

/s/ THOMAS C. MEGARGLE
Thomas C. Megargle

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the 2nd day of October in the year of our Lord one thousand nine hundred and eighty four

Present the Honorable

Robert J. Danhof, C.J.
Presiding Judge

Thomas M. Burns
Thomas C. Megargle

Judges

CITY OF WARREN, a municipal corporation,
Plaintiff-Appellee,

v

MICHIGAN DIVERSIFIED BUSINESS PROPERTIES, INC.,
Defendant-Appellant.

No. 72495
LC # 782669 CZ

MICHIGAN DIVERSIFIED BUSINESS CORP., d/b/a DANISH ADULT NEWS, d/b/a MEL-O-DEE RECORDS AND TAPES,
Plaintiffs-Appellants,

v

GEORGE O. BRUGGEMAN and PATRICK J. SANKEUR, and CITY OF WARREN, a municipal corporation,
Defendants-Appellees.

No. 72496
LC # 786375 CZ

In this cause a motion for rehearing is filed by appellants, and nothing in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion for rehearing be, and the same is hereby DENIED.

STATE OF MICHIGAN——ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 4th day of October in the year of our Lord one thousand nine hundred and eighty four.

/s/ Ronald L. Dzierbicki
Chief Clerk

Filed
Apr 26
[Illegible]
Mt. Clemens, Michigan

STATE OF MICHIGAN

IN THE

CIRCUIT COURT FOR THE COUNTY OF MACOMB

CITY OF WARREN, a Municipal Corporation,

Plaintiff,

-vs-

JOHN DOE, a/k/a DANISH ADULT NEWS, a/k/a MICHIGAN DIVERSIFIED PROPERTIES, INC., a/k/a GORDON STUDIOS, a/k/a MEL-O-DEE RECORDS, JOHN MESK, HELEN MESK, MICHIGAN DIVERSIFIED BUSINESS CORPORATION, d/b/a MEL-O-DEE RECORDS AND TAPES, and d/b/a DANISH ADULT NEWS, and S.M.R. CORPORATION, d/b/a GORDON STUDIOS,

Defendants.

File No. 78-2669 CZ

OPINION

A. PREFACE:

This matter has its foundation in a series of frequently amended claims by the Plaintiff, City of Warren, that the Defendants have connived to set up a series of sex-related businesses within the City's corporate boundaries. It is asserted

that the Defendants have violated numerous City Ordinances and that their conduct constitutes a nuisance *per se*. The City seeks a declaratory Judgment regarding the nuisance issue and an order to abate the alleged nuisances. Injunctive relief of a prospective nature is also sought.

Defendants have counter-complained for declaratory and injunctive relief concerning Warren City Ordinance WCO 8-241. Defendants ask this Court to declare the aforesaid Ordinance unconstitutional and to enjoin its further enforcement. Defendants have further moved for a Writ of Mandamus.

At issue presently are two motions brought by the Defendants. The first seeks a dismissal of the City's claims under GCR 117.2(1) and 117.2(3). The second seeks a favorable resolution of the Defendants' counter-complaint.

B. **SUMMARY JUDGMENT MOTION PROCEDURE:**

Defendants' First Motion encompasses two of three grounds enumerated for relief under GCR 1963, 117, notably subsections (1) and (3) of that rule. For reasons hereinafter set forth, the motion will be reviewed under subsection 1 only.

Motions based on subsection 1 are premised upon an assertion that the plaintiff has failed to state a claim upon which relief may be granted. The standard of review in such instances is clear. A motion based on subsection 1 challenges the legal sufficiency of the plaintiff's claim and is to be considered by an examination of the pleadings alone. Every well-pleaded allegation must be taken as true. The test is whether plaintiff's claims are so clearly unenforceable as a matter of law that no factual development can justify a right to recovery. See *McMath vs. Ford Motor Company, 77 Mich.App. 721, 723-24 (1977).*

Outwardly, it would appear that the methods of review for motions under subsection 3 should also be considered, a closer examination indicates that this is not so. This Court has very

carefully examined the motion and the papers filed in support thereof. Nowhere in this file does it appear that defendants have filed any supportive affidavits to buttress their motion. While such affidavits are not required for motions under subsection 1, their presence is mandatory for a valid motion under subsection 3. See *Durant vs. Stahlin, 375 Mich. 628 (1965)*. This is so whether or not the opposing party objects to the affidavits' absence. See *Creech vs. Consumers Power, 59 Mich.App. 167 (1975)* and *Armstrong vs. Ross Township, 82 Mich.App. 77 (1978)*.

Plainly, the absence of any affidavits forces a conclusion that the motion is brought under subsection 1 only and so it will be considered.

C. **FACTS:**

The initial complaint, filed April 17, 1978, named a single defendant, Michigan Diversified Properties, Inc. This complaint asserted numrous, clandestine, illegal activities on the part of the Defendants, all of which were apparently designed to surreptitiously introduce a series of sex-related businesses into the City. The Complaint urged that this Court declare these activities to be nuisances *per se* and to issue injunctive orders abating these nuisances and proscribing further activity in this area.

A temporary restraining order barring occupancy of the subject premises pending the issuance of a valid certificate of occupancy by the City and an order directing defendants to show cause why the restraining order should not be continued were signed by this Court on April 17, 1978.

Three days later, on April 20, 1978, the City filed an amended complaint adding new defendants and allegations, but seeking essentially the same relief.

May 1, 1978, marked the date of entry of a preliminary injunction. The order stated that defendants' use of the premises at 22644 Van Dyke in Warren for retail and peep

shows was in violation of the original Certificate of Reoccupancy for a failure to conform with the terms of that document. The defendants were enjoined from occupying the premises until the City could re-inspect them. This order was amended two days latter to allow retail sales. However, the peep shows remained enjoined.

On May 30, 1978, the City filed a second amended Complaint adding yet more defendants and allegations of illegality. The prayers for relief were essentially unamended.

The second amended Complaint was answered on June 5, 1978, by denials of illegal conduct on the part of all defendants and a prayer for dismissal of the Complaint.

On the latter date, the defendants also filed a motion to set aside the preliminary injunction. It was affirmatively asserted that the defendants were complying with the applicable ordinance requirements and that the City nonetheless refused to issue a Certificate of Occupancy.

The City answered this motion by denying that defendants were in compliance with the local ordinances and by affirmatively declaring that the defendants had withdrawn the necessary plans and applications needed for approval of any Certificate of Occupancy.

On June 26, 1978, this Court denied the request to set aside the May 3, 1978, temporary injunction.

Some five days earlier, on June 21, 1978, the City filed a motion for leave to file a supplemental complaint claiming that additional grounds for injunctive relief has been discovered. The complaint itself was filed the following day.

The City then moved for a further preliminary injunction on July 12, 1978, asserting that premises at 22640 Van Dyke, Warren, were being used for portrait and other painting of nude human models in violation of WCO 8-241. Affidavits in support of these and other claims accompanied the latter pleadings.

The defendants then sought their own forms of relief in a countersuit filed August 7, 1978. The thrust of the counter-complaint goes to claim of constitutional invalidity on the part of WCO 8-241. Several different claims are made in this report. The counter-complaint asks for a declaratory judgment that the ordinance is organically defective and further, seeks temporary and permanent injunctive relief barring enforcement of the ordinance or threats of the same by the City and its agents.

On August 21, 1978, this Court entered an order granting leave to file a second supplemental complaint. The next day that complaint was filed. Inasmuch as the complaint essentially incorporates all of its predecessors' allegations a detailed examination of the same appears necessary.

Given the standards of review set forth earlier in regard to summary judgment motions, the ensuing paragraphs take all of the City's well-pleaded allegations as true. The parties are admonished that this method of factual analysis is applicable only to the opinion herein and that the Court takes no final position on the facts as they may later be adduced at a trial on the merits.

The well-pleaded factual allegations in the August 22, 1978, complaint state that the City is a chartered municipal corporation and that the Defendants John Doe a/k/a Danish Adult News, a/k/a Mel-O-Dee Records, a/k/a Michigan Diversified Properties, Inc., a/k/a Gordon Studios, do business at premises located at 22640-22644 Van Dyke, in Warren, Michigan. It is further asserted that Diversified Business operates under the assumed name of Mel-O-Dee Records and Tapes and Danish Adult News and that S.M.R. Corporation operates under the assumed name of Gordon Studios and that the Mesks are the owners of the Van Dyke premises.

The City then asserts that Michigan Diversified Properties, Inc., and Mel-O-Dee Records are not registered entities with either the Macomb County Clerk's Assumed Name Division or the State Department of Commerce.

The City contends that the subject premises are classified as C-2, a general business use, under the City's Zoning Ordinance. It is further contended that the issuance of a building permit is a requisite for use of land under this ordinance.

Such permits come from the City's Building Department and are issued upon approval of applications received by the Department. These applications must be accompanied by plans and specifications drafted in accordance with Section 22.04 of the Zoning Ordinance.

The City further alleges that, in April and June of 1977, defendants filed applications for building permits for the subject premises and that in May and June of 1977, two building permits were authorized.

Other than denying that John Mesk owns any of the premises on Van Dyke, defendants have not directly contested any of the above allegations. This in decided contrast to the following extensive allegations of fact, each and every one of which the Defendants categorically deny as being untrue.

The City first asserts that the 1977 building permit applications were for an "office building" and "portrait painting studio."

The City then contends that defendants undertook a program of extensive interior alterations which did not comply with the plans or applications. The alleged use now planned is not as an office, but rather as a motion picture theatre, book store and massage parlor, *inter alia.*

The City asserts that the building permits were obtained by a tri-partite misrepresentation of the businesses involved, the business activities to be conducted and the modifications to be made and further claims that the business to whom the permits were issued do not legally exist. If these allegations are true, a patent violation of the Warren Zoning Ordinance, Section 22.06(a) would be made out.

As to the "portrait studio", the City now asserts that this portion of the building has been altered for use as a massage parlor, peep show or bathhouse, *inter alia.* These uses are not approved and the permit for Reoccupancy was revoked on this basis.

The City goes on to claim that the above intended uses are in violation of certain cited ordinances above and beyond the Zoning Ordinances. It is contended that these proposed uses require special approval of the City's Planning Commission and that such approval has not been sought.

Finally, the City claims that defendants plan to run a nude human modeling agency, body painting agency and human escort service at the premises in violation of Warren City Ordinance 8-241.

Although defendants admit the MCL 125.587 provides that user carried in violation of local ordinances made under authority of that statute are nuisances *per se,* defendants deny the existence of any nuisances *per se* herein.

The City claims to the contrary and seeks a declaratory judgment that the defendants' actions are violative of its zoning ordinances, that such actions are nuisances and that they should be abated and enjoined. As noted, defendants deny all of the above allegations of fact.

D. THE MOTIONS FOR SUMMARY JUDGMENT AND MANDAMUS.

As was earlier noted, the within motion by defendants for summary judgment of dismissal in their favor does not fulfill the necessary requisites of GCR 1963 117.2(3). Evan a cursory review of the preceding section will disclose the presence of myriad factual questions. This alone would be preclusive of summary relief in the form sought. See *Rizzo vs. Kretschmer, 389 Mich. 363 (1973) e.g.*

As to the solely legal questions presented, the defendants' contention that a criminal act may not be enjoined even though it amounts to a nuisance *per se* is not so. See *Fredal vs. Forster, 9 Mich.App. 215 (1967)*. Similarly, the Court may enjoin a threatened violation of municipal licensing laws. See *Board of Health vs. Vink 184 Mich. 680 (1915)*.

The remainder of the allegations in the summary judgment motion depend at least to some extent on the facts to be adduced at a trial on the merits. For that reason, the motion for summary judgment is denied without prejudice.

Similarly, the motion for mandamus asserts a clear legal duty on the part of the City to issue a certificate of reoccupancy and a building permit for the subject premises. It is axiomatic beyond citation that the Court must find a breach of a clear legal duty before it may honor the requested relief. The factual disputes present herein clearly preclude such a finding at this time. The motion is denied without prejudice.

An Order consistent with the above rulings will enter forthwith.

E. THE MOTION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF.

On August 7, 1978, defendants S.M.R. Corporation d/b/a Gordon Studios filed a Counter-Complaint seeking a declaratory judgment that WCO 8-241 is violative of the United States Constitution and the Michigan Constitution of 1963 in one or more respects. Defendants further sought injunctive relief against the City and its agents restraining them from enforcing or threatening to enforce the said ordinance against them.

Gordon, as defendants will be referred to in the balance of this section, asserts that it provides services to the general public as an art and photographic studio. As a central part of this enterprise, Gordon makes available to its patrons the services of human models who may appear in various states of undress.

These models allegedly serve as subjects for artistic or photographic inspiration and reproduction to those artists or photographers who desire such services. Gordon specifically avers at paragraph 8 of its counter-complaint that the provision of nude human beings as models form a central part of its business. This admission brings on a confrontation between this portion of Gordon's business and the provisions of the challenged ordinance. WCO 8-241 reads as follows:

> "No person shall knowingly engage in any business which offers as its principal activity the provision of nude human models for artists and photographers."

Gordon's admissions put it squarely within the parameters of conduct proscribed by the ordinance, even as to the element of *mens rea*. Prosecutions against Gordon for violations of this ordinance upon a showing of proofs would appear to be well-founded, assuming that the ordinance is otherwise valid.

It bears noting that the ordinance is encompassed under that chapter of the City's Ordinances dealing with obscenity. No accompanying ordinance appears present which would clarify or modify the terms of WCO 8-241.

The Counter-Complaint raises several allegations of constitutional invalidity of the ordinance, to-wit: that the ordinance is void for vagueness, void for overbreadth, and violative of the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution. See Paragraph 9 of the Counter-Complaint. Paragraph 11 incorporates the Michigan Constitution without reference to specific sections. No specific First Amendment claims are made.

Rather peculiarly, Gordon's Brief in support of its counter-claim and motion for declaratory and injunctive relief prefers to address the more classic First Amendment claims of freedom of expression and invalidity of prior restraints. The Brief also addresses the issue of state pre-emption under Article 7, Section

22 of the Michigan Constitution of 1963 by asserting that the ordinance occupies an area already covered by the Michigan Statutes.

Prior to any direct review of the above claims, the threshold question of standing must be resolved. There is no question herein that Gordon has undertaken no effort to produce a single patron who claims to have had his artistic or photographic urges stifled by the operation of WCO 8-241. Rather, Gordon has undertaken to protect these desires without proof that any patrons exist who have ever expressed a wish to edify these desires.

Reference is made to *101 Studios Inc. vs. Bardal, 384 F.Supp. 852 (1974),* a case almost squarely on all fours with the matter at bar. In that case, the plaintiff operated an art studio which provided nude human models for its patrons. The business was classified as a public amusement and it appears that the plaintiffs had been prosecuted for lack of possessing a proper license.

In an action for injunctive relief in the United States District Court for the Southern District of New York, the Plaintiffs asserted, *inter alia,* that the licensing code operated as a prior restraint on legitimate First Amendment activity.

In a well reasoned decision, Hon. Richard Owen, the presiding Judge, opined in part that:

> ". . . . plaintiffs have demonstrated no First Amendment activity that is inhibited by the statute. The business itself is not engaged in the dissemination or communication of ideas or information. 101 Studios argues, however, that it is engaged in 'a speech related activity in that professional as well as amateur photographers utilize the premises for producing photographic images, pictures, for sale, reproduction, exhibition and other forms of dissemination.' Plaintiffs further contend that theirs is a speech related activity equivalent to the writing of a book, the printing of a magazine, the sculpting of a statute or the painting of an oil painting falling within the protection of the First

> Amendment. The analogy to 101 Studios is, however, more accurately one of the developers of film used in a motion picture or the landlord of a writer. The painter and sculptor are, if anything, more analogous to the customers of 101 Studios, whose First Amendment rights Plaintiffs are in reality attempting to assert. Since there is no reason for supposing that any inhibition to customers' rights cannot be asserted by the customers themselves, see *Griswold vs. Connecticut, 381 U.S. 479. 85 S.ct. 1678, 14 L ed. 2d 510 (1965),* and plaintiffs derive no cognizable derivative injury to their First Amendment rights, see e.g., *Pierce vs. Society of Sisters, 268 U.S. 510, 45 S. ct 571, 69 Led 1070 (1925),* I conclude that Plaintiffs lack standing to assert these First Amendment arguments. *Tileston vs. Ullman, 318 U.S. 44, 63 S ct 493, 87 Led 603 (1943); United States vs. Raines, 362 US 17, 21-22, 80 S ct 519, 4 Led 2d 524 (1960); Laird vs. Tatum, 408 U.S. 1, 13 n. 1, 92 Sct 2318, 33 Led 2d 154 (1972.)"*

Gordon has apparently anticipated the presence of cases such as *101 Studios, supra, at page 23 n. 10* of its Brief, wherein it asserts that the protection of the First Amendment extends not only to disseminators of materials but also to recipients. No serious student of constitutional law would quibble in the slightest with this statement. However, as noted above, Gordon, like 101 Studios, is not a disseminator of information. Rather, it is the vehicle by which one who wishes to create material may do so. No one would seriously argue that an embargo on type metal would fall for interference with the First Amendment. Yet that is the logic of the arguments proffered by Gordon in the matter at bar.

Gordon's reference to *Craig vs. Boren, 429 US 190, 50 Led 2d 397, 97 Sct 451 (1976)* is not persuasive. That case deals with the rule of *jus tertii,* a very different proposition from overbreadth. In *jus tertii* cases, the litigant asserts that the single action of a law both injures him and impinges on the rights of third persons. The matter at bar does not involve *jus*

tertii since the single application of the law at bar, while it injures Gordon, does not impermissably intrude upon the rights of the patrons. See *101 Studios, supra.*

There is the matter of Gordon's assertion that the ordinance unreasonably interferes with the realities of artistic endeavor. Gordon contends, apparently, that without commercialized nude modeling, artistic and photographic reproductions of nudes would be rendered a practical impossibility. Gordon offers no proofs to buttress this contention and given the privacy attendant to nude modeling sessions, this court doesn't believe that it could do so.

With all due deference to the hallowed provisions of the First Amendment rulings in the area of prior restraints, it is the considered opinion of this Court that the lack of any artist or photographer who is a patron of Gordon's to come forward and assert that his rights have been impinged operates as a bar to Gordon's assertion of a prior restraint. Nor is it now a proper time to proffer such a witness for purposes of the aforesaid motion. The motion has languished for reasons of time and difficulty of resolution and Gordon has shown no inclination to buttress its contentions in the aforesaid manner.

The next series of inquiries relate to the claims of due process. So far as the claims might relate to so-called economic "substantive" due process, the same are without merit.

It is not the province of the courts to draw upon their own views as the morality, legitimacy, and usefulness of a particular business in order to decide whether a law bears too heavily upon that business and by so doing violates due process. See *Joseph E. Seagram & Sons vs. Hostetter, 384 US 35, 86 Sct 1254, 16 Led 2d 336 (1966).* Courts are no longer concerned with the wisdom, need, or appropriateness of legislation, see *Ferguson vs. Skrupa, 372 US 726, 83 Sct 1028, 10 Led 2d 93, 95 ALR 2d 1347 (1963),* and do not sit as a superlegislative body concerned with what philosophy a state may or may not embrace, see *Sniadech vs. Family Finance Corp. of Bay View,*

395 US 337, 89 Sct 1820, 23 Led 2d 349 (1969). Rather a law may be misguided, see *James vs. Strange, 407 US 128, 92 Sct 2027, 32 Led 2d 600,* "uncommonly silly" see *Griswold, supra, Stewart, J.* dissenting at *14 Led 2d 540,* or harsh in its application, see *James vs. Strange, 407 US 128, 92 Sct 2027, 32 Led 2d 600 (1972)* and *Rummel vs. Estelle* ____ U.S. ____ *48 LW 4261 (1900).* These factors do not by themselves operate to void a law under the Due Process clause. Rather, it is only where a law violates a specific right set out in the Constitution, *see Ferguson, supra,* or a penumbral right inherent in the Constitution, see *Griswold, supra,* that a law may be found to be constitutionally defective. This is so even when a law operates to make certain otherwise legal business ventures illegal. See *Ferguson, supra.*

The next area of consideration is that of equal protection. The applicable standard in this instance would be that of the rational basis test. A few preliminary observations seem pertinent.

Equal protection is the guarantee that similar people will be dealt with in a similar manner and that people of different circumstances will not be treated as if they were the same. See *Tussman vs. tenBrock, The Equal Protection of the Laws, 37 California Law Review 341 (1949).* In reviewing any classification it must be determined whether or not the persons classified by the law for different treatment are in fact "dissimilar." The question relates to the basis upon which the government can distinguish between individuals in society. There is no requirement that government follow natural classifications and it may subdivide persons as it deems proper for the advancement of legitimate governmental purposes. See *Nowak, Rotunda and Young, Constitutional Law, Part 3 Chapter 16, p. 520.*

The rational basis test involves a court inquiry of whether a classification bears a rational relationship to an end of government which is not prohibited by the Constitution. So long as it is arguable that the legislative branch had such a basis for

creating such a classification the court will not upset the law. See *Nowak supra at p. 524* and *U.S. Department of Agriculture vs. Moreno, 413 U.S. 528, 93 Sct 2821, 37 Led 2d 782 (1973)*. This case also points out that e ery classification need not be drawn with precise mathematical certainty.

The objects of the ordinance herein could well be to discourage clandestine forms of prostitution, certainly a legitimate object of legislation. The cases do not require that the legislation have as its only object the elemination of a given evil, but rather, seem to require only that the law have some relevancy to the goal sought. See *McGowan vs. State of Maryland, 366 U.S. 420, 81 Sct 1101 6 Led 2d 393 (1961)* and *Dandridge vs. Williams 397 US 471, 90 Sct 1153, 25 Led 2d 491 (1970)*.

Based on the foregoing analysis, it would not appear that the ordinance is violative of equal protection.

Next are the claims of vagueness and overbreadth. Although these two doctrines bear a close relationship, the claims within deserve a separate analysis.

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned vs. Rockford, 408 US 104, 92 Sct 2294, 33 Led2d 722 (1972)*. The classic definition of vagueness is found in *Bouie vs. City of Columbia, 378 US 347, 84 Sct 1697, 12 Led 2d 894 (1964)* wherein the Court said that a law which either forbids or requires the doing of an act in terms so unclear that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

A second, equally important essential is that the law clearly sets forth the parameters of allowable or forbidden conduct to its would-be enforcers. Where a law encourages arbitrary and capricious conduct on the part of its enforcers, a law violates due process. See *Graccio vs. Pennsylvania, 382 US 399, 86 Sct 518, 15 Led 2d 447 (1966)*.

Moreover, as Gordon eloquently and correctly notes, the vagueness doctrine has a particularly vigorous use where First Amendment freedoms may be impinged. This is because the First Amendment needs breathing space. Accordingly, laws in this area must be drawn narrowly, clearly and specifically.

It is now incumbent to examine WCO 8-241 under the above standards. The acts proscribed herein are clear. Moreover, in the case at bar, Gordon has specifically averred that it understands the terms of proscription and has specifically admitted violation of these terms. Secondly, the ordinance contains clear standards for enforcement There is no danger, for instance, that a model posing for a class of medical students would be violating the law. Due process does not demand unattainable feats of statutory clarity. See *United States vs. Maude, 481 F2d 1062 (1973)*. The ordinance meets the first two tests.

The trial test is more restrictive, however. The question at bar is whether the ordinance brushes against First Amendment freedoms in an impermissable fashion. This Court does not believe that it does.

In the first instance, the ordinance does not regulate art or artistic expression. Rather, as noted earlier, it is essentially a business or economic regulation in that it proscribes businesses which provide nude models for hire. There is nothing in the ordinance which proscribes nude modeling utterly. A person may certainly pose in the altogether for an artist or photographer for no pecuniary gain. What is prohibited in the ordinance is the practice of posing in the buff for a profit motive. The claim of Gordon that the ordinance will violate the First Amendment by shutting out the sources of artistic or photographic inspiration is not made out. The statute is not impermissably vague.

Another allegation of unconstitutionality concerns the allegation that WCO 8-241 is defective for overbreadth. The essence of this doctrine is well covered by *Nowak, Con-*

stitutional Law, supra, at Part 3, Chapter 18, Section B, pp. 722-723 where it is said that:

> "An overbroad statute is one that is designed to burden to punish activities which are not constitutionally protected, but the statute includes within its scope activities which are protected by the First Amendment. *In a case of a statute* which is overbroad on its face, the speaker's actions or speech may not be protected by the First Amendment and thus the act could have been prohibited under a carefully drawn statute. Nevertheless, the Court will strike the overbroad statute because it might apply to others, not before the Court, who may engage in protected activity which the statute appears to outlaw. As Justice Brennan explained for the Court in *NAACP vs. Button, 371 US 415, 9 Led 2d 405, 83 Sct 328 (1963).*
>
> > 'The instant decree may be invalid if it prohibits privileged exercises of First Amendment rights *whether or not* the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar.'
> >
> > 'On the other hand, in non-First Amendment areas, one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.' *United States vs. Raines, supra.*"

Based on the foregoing analysis by *Nowak, supra,* the threshold issue on the overbreadth claim is whether WCO 8-241 regulates First Amendment activity.

This Court believes that "speech" should be very liberally defined. The most broad definition this Court has found is taken from *First Unitarian Church of Los Angeles vs. Los Angeles County 311, P2d 508, 519 (1957),* which says that:

> " 'Speech' in the broad sense embodies all means of expression and communication and is the primary behavior by which individuals and organizations converse and transmit ideas, information, and knowledge."

This Court does not believe that the activity proscribed by WCO 8-241 can be described as speech. Rather, as noted earlier, it is a business. The fact that a business' activities may lead to or provide grist for a First Amendment activity does not make the business itself a First Amendment activity. The manufacture of microphones and televisions is an example. So too, herein, the activity proscribed, providing subjects for artistic inspiration, is not art.

Moreover, the ordinance does not bar freedom of association, i.e., it does not bar nude modeling *per se,* it merely bars it for hire. There is nothing in the ordinance to prevent private modeling sessions so long as no business activity is present.

The lack of a First Amendment related activity being included in the ordinance's proscription prevents Gordon from asserting a claim of overbreadth. See *U.S. vs. Raines, supra.*

The final claim of organic invalidity relates to Gordon's assertion that the WCO 8-241 intruder upon an area pre-empted by state law. If true, the ordinance would be in violation of Article 7, Section 22 of the Michigan Constitution of 1963.

In *People v. Llewellyn, 401 Mich. 314 (1977),* the doctrine of pre-emption was extensively discussed. *Llewellyn* holds that a municipality is precluded from enacting an ordinance if (1) the ordinance is in direct conflict with the state statutory scheme, or (2) if the state statutory scheme pre-empts the ordinance by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even if there is no direct conflict between the two schemes.

In the area of pre-emption, *Llewellyn* sets out four tests at pages 323-24:

> "First, where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is pre-empted."
>
> "Second, pre-emption of a field of regulation may be implied upon an examination of legislative history."
>
> "Third, the pervasiveness of the state regulatory scheme may support a finding of pre-emption. *While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer premption, it is a factor which should be considered as evidence of pre-emption."*
>
> "Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest." (Emphasis added)

Llewellyn found that the East Detroit Ordinance governing obscenity was void for having intruded into a field of regulation pre-empted by the state, i.e., the regulation of obscenity. The East Detroit ordinance undertook to forbid trafficking in obscene materials, established standards for determining obscenity and set a limit on the possession of obscene materials. As *Llewellyn* clearly points out at *pages 326-327,* the ordinance encompassed the same materials and goals as the state statute.

A review of MCL 750.343a *et seq* discloses no provision comparable in scope to WCO 8-241. Moreover, the risks of balkanization of laws present in *Llewellyn* is not present here. As the case itself notes at *page 330:*

> ". . . we do not mean to suggest in this opinion that a municipality is pre-empted from enacting ordinances outside the field of regulation occupied by the state statutory scheme governing criminal obscenity. For example, there is not the slightest indication that the state Legislature

> acted in MCL 750.343(a) *et seq* to preclude local zoning ordinances governing the location of establishments featuring adult entertainment. . ."

This Court believes that WCO 8-241 is the type of municipal regulation specifically excepted from the sweep of *Llewellyn* by its own syntax. The ordinance does not regulate obscene conduct *per se*, but rather proscribes "occasions of sin" as it were. The Ordinance, in short, appears to fall squarely within the dictates of *Young vs. American Mini Theaters, Inc., 427 US 50, 71, 96 Sct 2440, 49 Led 2d 310 (1976)* that:

> "The city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems."

The claim of pre-emption does not lie.

It is clear from the foregoing that Gordon's claims of unconstitutionality of WCO 8-241 are without foundation. Its motion for declaratory and injunctive relief on the grounds state is denied with prejudice.

An Order in conformity with this portion of the Opinion may enter forthwith.

GEORGE R. DENEWETH
George R. Deneweth
Circuit Judge

DATED: April 21, 1978

cc: Mr. David Dalenberg
Assistant City Attorney
City of Warren

Mr. Carl L. Rubin
Attorney for Defendant

STATE OF MICHIGAN

IN THE

CIRCUIT COURT FOR THE COUNTY OF MACOMB

CITY OF WARREN, a Municipal Corporation,

Plaintiff,

-vs-

MICHIGAN DIVERSIFIED PROPERTIES, INC.,

Defendant.

Case No. 78-2669-CZ

MICHIGAN DIVERSIFIED BUSINESS CORP., d/b/a DANISH ADULT NEWS, d/b/a MEL-O-DEE RECORDS AND TAPES,

Plaintiff,

-vs-

GEORGE O. BRUGGEMAN, and PATRICK J. SANKAUER, and CITY OF WARREN, a Municipal Corporation,

Defendants.

Case No. 78-6375 CZ

OPINION

This matter is before the Court for decision on Briefs following a Stipulated Order which established the facts. It involves frequently amended claims by the City of Warren that Defendant Michigan Diversified Business Corp., has connived to set up a series of sex-related businesses in the City of Warren, including adult book sales, an escort service, nude modeling, body painting, and coin operated booths for the personal

viewing of adult films. It is asserted that Defendants have violated various city Ordinances and that the store constitutes a nuisance *per se*. Injunctive relief is sought. Defendant Michigan Diversified Business Corp. has counter-complained for Declaratory and Injunctive relief seeking a declaration that Warren City Ordinance WCO 14.02 is unconstitutional.

Although the Court adopts the stipulated statement of facts filed by the parties, some factual discussion is necessary for an understanding of the case.

Defendant Michigan Diversified applied to the City of Warren on April 13, 1977 for a permit to make interior modifications to a building at 22644 Van Dyke Avenue. The building contains contiguous separate commercial areas in which Defendant Michigan Diversified proposed to operate. Various permits were issued and inspections made regarding retail sales of tapes, records, artist studio and office. In March of 1978 the police, on information, looked around the building and observed a reception area, four rooms and a raised stage. On March 16, 1978 the City revoked the Certificates of reoccupancy. On April 12, 1978 retail sales of books and films began at 22644 Van Dyke. After May 5, 1978 nude body painting began at 22640 Van Dyke. Peep show booths were observed being built and a sign for "Danish Adult News" appeared. Approximately May 31, 1978 escort services were offered and after November of 1979 massages were offered. Plaintiff City of Warren started this action on April 17, 1978.

On September 27, 1977 the City of Warren adopted an Ordinance requiring special use approval for massage parlors. On May 29, 1978 the City of Warren amended Sec. 14.02 of Art. XIV of the Zoning Ordinance to require a site plan review and special land use approval before a certificate of approval could be issued for adult uses. On January 16, 1979 this was amended, in relevant part, providing for a waiver of restrictions on locations of adult business if fifty-one percent of adjoining property owners consented.

An Ordinance infringing on protected liberties must be narrowly drawn and must further a substantial governmental interest. *Schad v. Mt. Ephraim,* 452 US 61, 68; 101 S Ct 2176; 68 L Ed 2d 671 (1981). This standard contemplates a balancing of the infringement with the governmental interest served.

Warren's Ordinance is patterned after that of the City of Detroit which was discussed at length by the United States Supreme Court in *Young v. American Mini Theaters,* 427 US 50; 96 S Ct 2440; 19 L Ed 2d 310 (1976) and found to be a valid time, place and manner regulation of adult uses.

Young, supra, controls Diversified's equal protection argument. the *Young* Court ruled that even within the area of protected speech. a difference in content may require a difference in governmental response. 427 US p. 66. The Court found that the state could legitimately use the content of materials dealing with "specified sexual activities" as the basis for placing them in a different classification from other motion pictures.

Warren asserts that its Ordinance is a valid time, place and manner regulation because it restricts but does not ban specified adult uses to further a legitimate governmental interest.

In *Young,* the Supreme Court found that the limitations placed on adult uses were justified by the City's interest in preserving the character of its neighborhoods.

This Court finds that the Warren Ordinance furthers the legitimate interest of Warren to preserve the character of its neighborhood from the perceived danger of adult uses. The Ordinance does not have the effect of totally banning adult uses, but limits them to areas not contiguous with residential uses. On balance, the legitimate interest is found to justify the infringement on liberty. It is a valid time, place and manner regulation.

Further, the Ordinance has been weighed by many other state courts and found with only two exceptions to be constitutional. *Dandy v. Civil Service,* 401 NE2d 1380 (1980); *Walnut Properties v. Long Beach City Council,* 161 *Cal Rptr.* 411; 100 Cal App 3d 1018 (1980); *Texas National Theatres v. City of Albuquerque,* 639 P2d 569 (1982); *Kacar v. Zoning Hearing Board of the City of Allentown,* 432 A2d 310 (1981). The Court is not unmindful of the cases of *County of Cook v. Worldwide News Agency,* 424 NE2d 1173 (1981) where a similar ordinance was held to be an excessive restraint and unconstitutional and *Keego Harbor v. City of Keego Harbor,* 657 Fed 2d 94 (6th Cir. 1981) where it was found that the local Ordinance had the effect of banning adult uses from the City of Keego Harbor. This Court finds the later cases factually distinguishable and does not choose to follow either case.

The Court finds Diversified's remaining arguments to be without merit.

It is not necessary for Warren to articulate a basis for the Ordinance based on empirical research in the City of Warren, findings, or testimony. Legislative bodies can act without scientific data and upon unprovable assumptions. *Paris Adult Theater I v. Slaton,* 413 US 49, 59-61; 93 S Ct 2628; 37 L Ed 2d 446 (1973). Legislative bodies can also act upon the research and findings of other municipalities. It is not for the courts to resolve empirical uncertainties underlying legislation. *Id.*

The record before the Court shows that the Warren City Planning Commission drew upon the experience and research of the City of Detroit in recommending the challenged Ordinance for passage as well as personal beliefs as to citizens' concerns about adult uses. That same record also shows that Warren had no prior adult uses, and is a relatively young city. It thus lacked actual experience to rely upon.

Nor is the Ordinance an unconstitutional prior restraint requiring a disseminator of protected speech to receive administrative approval prior to dissemination of that speech. WCO

14.02(C)(2) and WCO 21.06 provides sufficient administrative standards by which the Commission is to determine if approval is to be granted. See *Bruni v. Farmington Hills,* 96 MichApp. 664,666; 293 NW2d 609 (1980). It would be impossible to require separate guidelines for approval because each site plan is different.

Diversified lastly argues that its proposed use of booths in which one person may view films by inserting coins in a machine is not an "adult-mini-motion picture theater" within the meaning of WCO 14.02(C)(1)(c) which provides:

> "An enclosed building with a capacity for less than fifty persons used for presenting material distinguished or characterized by an emphasis on matters depicting, describing or relating to 'specified activities' or 'specified Anatomical Areas' (as defined below) for observation by patrons therein."

The Court finds Diversified's proposed arrangements to fall within the Ordinance definition of an adult mini-motion picture theater. The use is proposed in an enclosed building. The capacity is less than fifty persons. Each booth is proposed for the showing of described specified activity and is admittedly for observation by patrons. All the elements of the Ordinance definition are present. While the ordinary meaning of "theater" may imply more than one individual watching at a time, ticket takers, and a projectionist, that does not prevent a municipality from attaching a broader meaning to the word. Warren has done so.

In summary, the Court finds Diversified's challenges to the Warren Ordinance to be without merit. On this record, Defendants have violated and continue to violate City of Warren Ordinances. An injunction restraining Defendant Michigan Diversified Properties from the operation of any of the proposed adult uses until Defendant complies with the City of Warren Ordinances will issue. Defendan't requested relief is DENIED.

An Order consistent with this Opinion will enter on Notice and presentment.

/s/ GEORGE R. DENEWETH
George R. Deneweth
Circuit Judge

DATED: SEPTEMBER 20, 1982
CC: Mr. David L. Dalenberg
City of Warren Attorney
29500 Van Dyke Avenue
Warren, MI., 48093

Mr. Gregory Fisher Lord
Michigan Diversified Attorney
1330 North Park Plaza
17117 West Nine Mile Road, Ste. 1330
Southfield, MI., 48075

A True Copy

[signature illegible]
County Clerk

By _____
Deputy Clerk

STATE OF MICHIGAN

IN THE

CIRCUIT COURT FOR THE COUNTY OF MACOMB

CITY OF WARREN, a Municipal Corporation,

Plaintiff,

vs.

MICHIGAN DIVERSIFIED PROPERTIES, INC.,

Defendant.

Case No. 78-2669-CZ

MICHIGAN DIVERSIFIED BUSINESS CORP., d/b/a DANISH ADULT NEWS, d/b/a MEL-O-DEE RECORDS AND TAPES,

Plaintiff,

vs.

GEORGE O. BRUGGEMAN, and PATRICK J. SANKEUR, and CITY OF WARREN, a Municipal Corporation,

Defendants.

Case No. 78-6375-CZ

DAVID L. DALENBERG (P12451)
Attorney for City of Warren, et al.

GREGORY FISHER LORD (P30381)
Attorney for Michigan Diversified

ORDER GRANTING PERMANENT INJUNCTION AND DENYING REQUEST FOR DECLARATORY JUDGMENT

At a session of said Court held in the Courtroom of the Macomb County Court Building, in the City of Mount Clemens, Macomb county, Michigan, on the ____ day of December 6, 1983.

PRESENT: HONORABLE GEORGE R. DENEWETH, CIRCUIT JUDGE

This cause having come on for trial upon the Complaint of plaintiff demanding that defendants be restrained from operation of any of the proposed adult uses until Defendant complies with the City of Warren ordinances and Defendant's counter complaint for Declaratory and Injunctive Relief seeking a declaration that Warren City Ordinance 14.02 is unconstitutional, and this Court having adopted the statement of facts filed by the parties and having read the briefs submitted herein and heard the argument of the attorneys for the respective parties, and for the reasons set forth in this Court's Opinion dated September 20, 1982;

IT IS ORDERED AND ADJUDGED that plaintiff's request for a Permanent Injunction restraining Defendant Michigan Diversified Properties from the operation of any of the proposed adult uses until it has complied with the City of Warren Ordinances be and hereby is granted.

IT IS FURTHER ORDERED that the Counter Complaint for Declaratory and Injunctive Relief be denied and the County Complaint dismissed with prejudice.

GEORGE DENEWETH
Circuit Judge

By Betty [illegible]
County Clerk

STATE OF MICHIGAN

IN THE
CIRCUIT COURT FOR THE COUNTY OF MACOMB

CITY OF WARREN, a Municipal Corporation,
Plaintiff,
vs.
MICHIGAN DIVERSIFIED PROPERTIES, INC.,
Defendant.
Case No. 78-2669-CZ

MICHIGAN DIVERSIFIED BUSINESS CORP., d/b/a DANISH ADULT NEWS, d/b/a MEL-O-DEE RECORDS AND TAPES,
Plaintiff,
vs.
GEORGE O. BRUGGEMAN, and PATRICK J. SANKUER, and CITY OF WARREN, a Municipal Corporation.
Case No. 78-6375-CZ

JUDGMENT

At a session of the Circuit Court for the
County of Macomb, held on JUN 29 1983
before the HONORABLE GEORGE R. DENEWETH

The above-referenced cases were consolidated by oral order of this Court during the course of proceedings on 21 September 1981, with this Court having, on 20 JUNE 1983, entered its Judgment that the injunctive relief requested by the

City of Warren in Case No. 78-2669-CZ should be, and was, granted, and in addition, that the Counter-Complaint filed in Case No. 78-2669-CZ should be, and was, dismissed.

There has, however, been no Judgment entered dismissing the original claim filed by Michigan Diversified in Case No. 78-6375-CZ.

For the reasons stated above and for the reasons stated in this Court's 20 September 1982 Opinion, it is herewith Ordered and Adjudged that the Complaint filed in Case No. 78-6375-CZ be, and hereby is, dismissed with prejudice.

JOHN G. ROSKOPP
Circuit Judge
In absence of
Judge George R. Deneweth

Approved as to form:

_____

David Dalenberg
Attorney for Defendants

_____

Gregory Fisher Lord
Attorney for Plaintiffs

A true copy

[Signature Illegible]
County Clerk or

By _____

15192 THIRTEEN MILE RD., 4061 E. Eight Mile Rd., Plaintiffs,

v.

CITY OF WARREN, Defendant.

Civ. Nos. 83 CV 9030 PH, 83 CV 9078 PH.

United States District Court,
E.D. Michigan, S.D.

Aug. 8, 1984.

Plaintiff brought action challenging city zoning ordinance restricting adult bookstores. The District Court, James Harvey, J., held that city zoning ordinance restricting adult bookstores was unconstitutional only in requiring special land use permit and site plan approval, and thus, plaintiff was entitled to a preliminary injunction.

Ordered accordingly.

1. Federal Civil Procedure 835

In action involving conflict between interests of municipality in planning community development through zoning ordinance and First Amendment interests of businesses offering adult entertainment, plaintiff would be allowed to amend complaint to reflect certain evidence which was produced without objection at preliminary injunction hearing given liberal amendment policy stated in Federal Rules of Civil Procedure and given fact that amendment would not prejudice defendant. Fed.Rules Civ.Proc.Rule 15, 28 U.S.C.A., U.S.C.A. Const.Amend. 1.

2. Federal Courts 53

In action involving conflict between interests of municipality in planning community development through zoning ordinance and First Amendment interests of businesses offering

adult entertainment, abstention was not required under either *Pullman* doctrine or *Colorado River* doctrine where defendant had not identified any uncertain state law issues, federal forum was not inconvenient, there was no threat of piecemeal litigation, plaintiff did not consent to state jurisdiction, and there was no federal statute directing litigation towards resolution in state court. U.S.C.A. Const.Amend. 1.

3. Federal Civil Procedure 1829, 1835

In considering a motion to dismiss for failure to state a cause of action, complaint is construed favorably to pleader and its allegations are taken as true.

4. Federal Civil Procedure 1773

In appraising sufficiency of complaint, the district court follows accepted rule that complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

5. Civil Rights 13.12(2)

Standard for measuring sufficiency of plaintiff's complaint is to be strictly applied in civil rights actions.

6. Zoning and Planning 590

Plaintiff's complaint challenging on First Amendment grounds city zoning ordinance restricting location of adult bookstores stated a cause of action. U.S.C.A. Const.Amend. 1.

7. Constitutional Law 42.2(1)

In cases presenting First Amendment problems, plaintiff may challenge a zoning statute whether or not plaintiff's conduct could be proscribed by properly drawn statute and whether or not plaintiff applied for a license. U.S.C.A Const.Amend. 1.

8. Attorney and Client 21.20

Defendant's motion to disqualify plaintiff's attorney was moot where there was substitution of counsel subsequently to defendant's motion to disqualify.

9. Evidence 5(2),51

In action involving conflict between interests of municipality in planning community development through zoning ordinance and First Amendment interests of businesses offering adult entertainment, District Court declined to take judicial notice of certain requested facts concerning offering of book through publication of book club where those facts were neither generally known within territorial jurisdiction of trial court nor capable of accurate and ready determination by resort to sources whose accuracy could not reasonably be questioned. U.S.C.A. Const.Amend. 1.

10. Zoning and Planning 76

City zoning ordinance's definition of adult bookstore using the terms "substantial or significant portion" of its stock and trade when specifying what types of bookstores are adult bookstores was reasonably specific and precise and was not overbroad or vague. U.S.C.A. Const.Amend. 1.

11. Zoning and Planning 134

If zoning ordinance regulating adult bookstores is to be upheld as constitutional, local government must factually justify its need to regulate adult bookstores; however, there is no requirement for city to conduct its own research in that area, city need not await deterioration in order to act, and city is entitled to rely on experience and findings of other legislative bodies as a basis for action.

12. Zoning and Planning 134

City council's reliance on another city's experience in regulating adult bookstores was a sufficient factual justification for its zoning ordinance.

13. Zoning and Planning 76

It would be unconstitutional for municipality to zone adult uses into swamps, warehouses, and shipyards, where there are few access roads, and locations are poorly lit and perhaps unsafe.

14. Zoning and Planning 76

Fact that plaintiff may not have been able to afford renovation or construction of certain buildings for an adult bookstore did not render zoning ordinance regulating placement of adult bookstores invalid.

15. Zoning and Planning 76

City is not required to provide sites which assure commercial success of adult bookstore.

16. Zoning and Planning 21, 86

City's zoning ordinance restricting adult bookstores was unconstitutional in requiring special land use permit not located in city center district in site plan approval since requirement left improper degree of discretion in local officials; however, those requirements were severable from remainder of ordinance and only those would be stricken.

17. Zoning and Planning 86

For there to be effective zoning permit requirement, municipality must provide narrowly drawn, objective, reasonable, and definite standards to guide administering officials.

18. Zoning and Planning 41

Discretion vested in various local bodies for approving special zoning uses in city center district was constitutional since city needed ability to require special permits for small area of historical or cultural importance to community.

Stephen M. Taylor, Southfield, Mich., for plaintiffs.

David Dalenberg, Asst. City Atty., Warren, Mich., James I. DeGrazia, Detroit, Mich., for defendant.

MEMORANDUM OPINION AND ORDER

JAMES HARVEY, District Judge.

This case raises the intractable problem of resolving the conflict between the interests of a municipality in planning community development through a zoning ordinance, and the First Amendment interests of businesses offering adult entertainment. The problem is exacerbated in the instant case by a lengthy and complex procedural history.

Plaintiff[1] is a Michigan corporation which acquired a leasehold interest in certain property located at 15192 Thirteen Mile Road, Warren, Michigan. Plaintiff is interested in establishing an adult bookstore at the Thirteen Mile Road address, and has challenged those sections of the Warren Zoning Ordinance which regulate adult bookstores. Plaintiff raised this challenge by moving for a preliminary injunction. Pursuant to 28 U.S.C. § 636(b)(1)(B), the Court referred this matter to U.S. Magistrate Harvey D. Walker to conduct a hearing on plaintiff's motion for preliminary injunction, and thereafter to file findings of fact, conclusions of law, and a recommendation of judgment. Magistrate Walker held a hearing on plaintiff's motion for preliminary injunction, and on September 20, 1983,

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[1] Although two plaintiffs are designated in the caption of the case, the Court will refer simply to plaintiff, for 4061 Eight Mile only recently entered the case through consolidation, and all the motions in the case were raised by 15192 Thirteen Mile Road.

filed a Memorandum Opinion and Recommendation setting forth findings of fact, conclusions of law, and a recommended resolution of plaintiff's motion for preliminary injunction.

In response to the Magistrate's recommendation, defendant filed a motion to dismiss, timely objections, and incorporated within the objections to the Magistrate's recommendation a motion for summary judgement. Moreover, the course of litigation since the Magistrate's recommendation has engendered numerous other motions. Thus, the Court has before it the following matters:

1. Plaintiff's motion to amend;
2. Defendant's motion to abstain;
3. Defendant's motion to dismiss;
4. Defendant's motion to disqualify Gregory Fischer Lord as plaintiff's attorney;
5. Plaintiff's motion to take notice of adjudicative fact;
6. Plaintiff's motion for preliminary injunction;
7. Plaintiff's motion for summary judgment; and
8. Defendant's motion for summary judgment.

The Court will discuss the motions in the order listed above, but before addressing the motions, the Court must set forth the relevant facts. The Court's statement of the relevant facts is largely derived from U.S. Magistrate Harvey D. Walker's findings of fact, which the Court has reviewed de novo in light of the transcript of the hearing held before the Magistrate.[2] *Hill v. The Duriron Co. Inc.*, 656 F.2d 1208 (6th Cir. 1981).

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[2] During the transmittal of this case between the Magistrate's Office and the Court, the exhibits admitted at the preliminary injunction hearing were lost. Mr. Gregory Fischer Lord's office has provided duplicates of the exhibits admitted at the preliminary injunction hearing, and pursuant to a stipulation of the parties, the Court will consider these duplicates in reviewing this case.

I. *Relevant Facts*

Plaintiff is a Michigan corporation which acquired a leasehold interest in certain property located at 15192 Thirteen Mile Road, Warren, Michigan. Pamela Ramsey, the president and sole stockholder in plaintiff corporation, desires to establish a bookstore offering adult materials at the leased site. Plaintiff does not yet have any plan as to the exact proportion of adult materials that would be offered in the bookstore.

Plaintiff's leasehold is located in a C-1 zoned district in the City of Warren. Although a bookstore is permitted to locate in a C-1 zoned district, an adult bookstore may not. Section 14.02(c)1(a) defines adult bookstore as follows:

> [C] ADULT BOOKSTORE: An establishment having a substantial or significant portion of its stock in trade, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Special Anatomical Areas," (as defined below), or an establishment with a segment or section devoted to the sale or display of such material.

To further clarify the definition of adult bookstore, the zoning ordinance defines "specified sexual activities" and "specified anatomical areas" in the following terms:

> *Specified Sexual Activities. Specified Anatomical Areas:*
>
> For the purposes of this section, "Specified Sexual Activities" is defined as follows:
>
> (1) Human genitals in a state of sexual stimulation or arousal.
>
> (2) Acts of human masturbation, sexual intercourse or sodomy.
>
> (3) Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

And, "Specified Anatomical Areas" is defined as:

(1) Less than completely and opaquely covered:

(a) human genitals, pubic region,

(b) buttock, and

(c) female breast below a point immediately above the top of the areola.

(2) Human male genitals in a discernibly turgid state even if completely and opaquely covered.

Warren Zoning Ord. 1402(c)(1)(F).

The Warren zoning ordinance divides the city into eighteen zoning districts. An adult bookstore may locate in only four of those zones: General Business District (C-2), Wholesale and Intensive Business District (C-3), and Industrial Zones (M-1) and (M-2). To locate in any of these four zoning districts, an adult bookstore must obtain the special use approval of both the City Planning Commission and the Board of Zoning Appeals. The application for a special use approval must also be accompanied by a site plan application. The Warren zoning ordinance states that a special use may be permitted only if it is not injurious to the zoning district and surrounding areas, and is not contrary to "the spirit and purpose of the ordinances." (Warren Zoning Ord. 14.02).

In addition, the Planning Commission cannot approve the site plan of an adult bookstore if any of the following conditions are found to exist:

a) The site is located on other than a major thoroughfare, as designated in the Master Thoroughfare Plan.

b) The site is closer than 500 feet to the property line of an area zoned residential or a residential use.

c) The site is located closer than 1,000 feet to a site having an adult business designation under this section or

> closer than 1,000 feet to the property line of any church or private or public school.
>
> Warren Zoning Ord. 14.02(c)(2).

When reviewing a site plan, the Commission must also determine whether the particular use will have a "deleterious effect on the surrounding area." There is, however, a provision in the zoning ordinance permitting the Planning Commission to waive the spatial restrictions if 51% of the persons owning, residing, or doing business within 500 feet of the adult business, approve that use through a petition of notarized signatures.

The Warren Planning Commission is composed of fourteen citizens from the community who serve on a voluntary basis, while the Warren Board of Zoning Appeals is a nine-member body appointed by the City Council, and is also drawn from the community to serve on a voluntary basis. There is no time period established during which either of the two groups must complete their review processes.

A City Center District is also located in the City of Warren in an area immediately surrounding a local government complex. The City Center area is in a C-2 district, and in addition to meeting all the other zoning requirements of a C-2 district, any business that wishes to locate in the City Center area must obtain the approval of the City Council.

The legislative history of zoning control of adult bookstores in Warren is notably sparse. The first proposal was broached by Warren City Councilman Austin at a Warren City Council meeting held on February 27, 1973. At that meeting, Councilman Austin suggested that the City Attorney's Office research the possibility of a regulatory scheme to keep various types of "adult" activities out of Warren. City Planner John Daily testified that the proposed ordinance was held in abeyance while the courts reviewed the case of *Young v. American Mini-Theatres.*

Thus, the first attempted regulation of adult bookstores by the City of Warren was Ordinance No. 30-559, an amendment to Section 14.02, passed by the City Council on May 9, 1978. This amendment modified Section 14.02 by requiring, in addition to the earlier requirements of Section 14.02, spatial limitations on adult uses and the consent of 51% of the surrounding landowners before "special use" approval could be granted. A second amendment to Section 14.02, Ordinance No. 30-566, was passed by the City on August 22, 1978. This amendment made only minor modifications to Ordinance 30-559.

Ordinance No. 30-573 was passed by the Warren City Council on December 27, 1978. This ordinance rescinded the 51% requirement contained in the earlier ordinances, and added a new clause that allowed for the waiving of the remaining spatial criteria if the applicant acquired the signatures of 51% of the surrounding landowners consenting to such waiver.

None of the ordinances passed by the City of Warren regulating adult bookstores have any factual findings or statement of purpose in their text. Moreover, no evidence was submitted showing that the City Council ever considered testimony or documents detailing the benefits of the dispersal type of zoning which was adopted. Defendant did represent at the preliminary injunction hearing that it would commission future studies to justify the ordinance.

There are 85 sites currently available in the City of Warren which satify the spatial requirements of the zoning ordinance. Mr. Mark Toth, a licensed commercial real estate broker, testified that he had inspected the 85 sites. Mr. Toth stated that most of the 85 sites were not commercially feasible for the operation of an adult bookstore. The commercial impracticability of some sites, such as the site on the land occupied by the General Motors Technical Center, are obvious. As for the other sites, the difficulties are not quickly apparent. For example, the site with Sidwell Number 13-03-352-004 is a vacant lot on the

corner of Mound and Thirteen-Mile Roads. Mr. Toth testified that the site is not feasible because building costs would be prohibitive for a small retailer like an adult bookstore. The site with Sidwell Number 13-04-226-014 is a small vacant building located at 7150 Fourteen-Mile Road. Mr. Toth stated that this was not a feasible site because the building required renovation, and any sale or lease price would be excessive for a small retailer. Similar explanations of commercial impracticability were offered for sites at Sidwell Numbers 13-04-226-016, 13-24-354-001, 13-25-102-008, 13-25-102-011, and 13-25-201-008. The Court presumes that such explanations would also apply to vacant lots at Sidwell Numbers 13-06-151-005, 13-10-151-020, and 13-10-301-001, as well as the small retail outlet at 13-10-151-015.

II. *Plaintiff's Motion to Amend*.

[1] After the Magistrate's recommendation, defendant moved to dismiss the complaint, asserting as one basis that plaintiff failed to allege sufficient facts to show standing. A similar argument was raised in defendant's response to plaintiff's motion for summary judgment. Plaintiff proposes to amend its complaint to reflect certain evidence which was produced without objection at the preliminary injunction hearing. Specifically, plaintiff wishes to allege that plaintiff has yet to determine what portion of its stock in trade will be adult books, and that plaintiff wishes to avoid the penalties which would flow from a violation of the ordinance. Plaintiff also desires to allege that the language of the ordinance is vague and overbroad.

Given the liberal amendment policies stated in FR.Civ.P. 15, and because an amendment would not prejudice defendant, the Court hereby GRANTS plaintiff's motion to amend its complaint. For purposes of this opinion, the Court will decide all motions in light of the allegations set forth in plaintiff's proposed amended complaint filed on November 16, 1983.

This procedure works no injustice on the defendant, for the proposed amended complaint merely conforms the pleadings to the proofs submitted at the preliminary injunction hearing.

In addition, the Court will consider plaintiff's proposed amended complaint as a properly filed amended complaint, as of the date of this opinion. Defendant must respond within the appropriate time limits.

III. *Defendant's Motion to Abstain*

[2] Defendant moves for abstention on two grounds. First, defendant contends that abstention is required under the doctrine enunciated in *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). in *Pullman*, the Supreme Court held that abstention may be appropriate where the resolution of uncertain state law issues could moot a federal constitutional issue, or cause it to be presented in a different posture. *ADA-Cascade Watch Co. Inc. v. Cascade Resource Recovery Inc.*, 720 F.2d 897 (6th Cir.1983). Defendant has not identified any uncertain state law issues which would require abstention under *Pullman*.

Defendant's second argument is that the Court should abstain because this case is analogous to *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). *Colorado River* was the case where the Supreme Court first held that a U.S. District Court may dismiss a federal suit due to the presence of a concurrent state proceeding. Yet the Supreme Court was careful to emphasize the extraordinary circumstances under which a District Court could abstain because of a concurrent state proceeding, stating the following test:

> In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a federal court may also consider such factors as the inconvenience of the federal forum; the desirability of avoiding piecemeal litiga-

> tion; and the order in which jurisdiction was obtained by the concurrent forums. No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required. Only the clearest of justifications will warrant dismissal. *Id.* at 818-819, 96 S.Ct. at 1247.

The subsequent Supreme Court decision of *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 98 S.Ct. 2552, 57 L.Ed.2d 504 (1978) appeared to expand the narrow terms of *Colorado River*. Indeed, this Court followed this expanded interpretation when it issued an order abstaining in *Michigan Diversified Business Corp. v. City of Warren*, civil no: 81-30097 (A copy of the opinion is attached to defendant's brief in support of defendant's motion to abstain.) Since the *Calvert Fire Insurance* case, the Supreme Court has reanalyzed the approach of *Colorado River*, and limited that doctrine only to the extraordinary situations which engendered it. *Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765. (1983). The *Cone* case discusses abstention and reaffirms the language of *Colorado River* dictating a strict balancing of factors which determine abstention. The *Cone Hospital* opinion also places emphasis on the fact that *Colorado River* involved the effect of the McCarran Amendment, 43 U.S.C. § 666, and the Amendment's waiver of the government's sovereign immunity to permit the joinder of the United States in state-court suits for the adjudication of water rights.

In the instant case, most factors militate against abstention under *Colorado River*, for the federal forum is not inconvenient, there is no threat of piecemeal litigation, the plaintiff does not consent to state jurisdiction, and there is no federal statute directing this litigation towards resolution in in state court.

Accordingly, defendant's motion to abstain is hereby DENIED.

IV. *Defendant's Motion to Dismiss*

Defendant attacks plaintiff's complaint on the grounds that it fails to allege sufficient facts showing what steps plaintiff took to commence business, and how defendant's zoning ordinance harms plaintiff. Defendant's motion to dismiss was filed after the hearing on the motion for preliminary injunction and the Magistrate's recommendation for disposition of the motion for preliminary injunction. The Court will therefore consider the plaintiff's amended complaint in ruling on this motion, since the amended complaint only conforms the pleadings to the proofs submitted during the hearing on the preliminary injunction.

[3, 4] In considering a motion to dismiss for failure to state a cause of action, the complaint is construed favorably to the pleader and its allegations are taken as true. *Scheuer v. Rhodes,* 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). The test for measuring the sufficiency of plaintiff's complaint was set forth in *Conley v. Gibson,* 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), where the Supreme Court held:

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief.

[5] As the Sixth Circuit has recognized, this standard is to be strictly applied in civil rights actions:

> Dismissals of complaints under the civil rights statutes are scrutinized with special care. A Complaint need not set down in detail all the particulars of a plaintiff's claim against a defendant. Rule 8(a)(2) simply requires a "short and plain statement of the claim showing that the pleader is entitled to relief . . ." FR.Civ.P. 8(a)(2). All a complaint need to do is to afford the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." [cites omitted] *Westlake v. Lucas,* 537 F.2d 857 (6th Cir.1976).

[6,7] Given the standard of review, the Court finds that plaintiff's complaint sets forth the impact of the ordinance on plaintiff's proposed business operation. Such allegations are sufficient, for in cases presenting First Amendment problems, the plaintiff may challenge a statute whether or not plaintiff's conduct could be proscribed by a properly drawn statute, and whether or not plaintiff applied for a license. *Entertainment Concepts Inc. III v. Maciejewski,* 631 F.2d 497 (7th Cir.1980), *cert. denied,* 450 U.S. 919, 101 S.Ct. 1366, 67 L.Ed.2d 346 (1981). Accordingly, defendant's motion to dismiss is DENIED.

V. *Defendant's Motion to Disqualify Gregory Fischer Lord as Plaintiff's Attorney*

[8] Defendant contends that Gregory Fischer Lord should be disqualified as plaintiff's counsel because he will most likely be called as a witness during the trial of the instant case. The possibility of Mr. Lord appearing as a witness derives from the legal work he performed in obtaining plaintiff's leasehold, and the difficulties which arose between Mr. Lord and the Mayor of Warren, as detailed in *The Macomb Daily* in September and October of 1983.

Subsequent to defendant's motion to disqualify, there was a substitution of counsel, with Mr. Stephen Taylor replacing Mr. Lord. Defendant's motion to disqualify Gregory Fischer Lord as plaintiff's attorney is therefore DENIED AS MOOT.

VI. *Plaintiff's Motion to Take Notice of Adjudicative Facts*

[9] Plaintiff's requests that the Court take judicial notice that:

> (A) the *Book-of-the-Month Club News* is published by the Book-of-the-Month Club, Inc. of Camp Hill, Pennsylvania, and (B) that the July, 1983 edition of the *Book-of-the Month Club News* offers to its customers the following

book: *A Child is Born* by Lennart Nilsson, with this offering being made at Page 26 of the July 1983 edition of the *Book-of-the-Month Club News.*

Although judicial notice may be taken at any point in the proceedings, the Court declines to take judicial notice of the requested facts. The Court believes that these facts are neither generally known within the territorial jurisdiction of the trial court, nor capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Thus, plaintiff's motion to take notice of adjudicative facts is hereby DENIED.

VII. *Plaintiff's Motion for Preliminary Injunction.*

Plaintiff challenges defendant's zoning ordinance regulation of adult bookstores on the following three grounds:

A. The zoning ordinance is void for vagueness and overbroad;

B. The zoning ordinance is unconstitutional because there is an insufficient factual justification for the regulation of adult entertainment facilities; and

C. The zoning ordinance is unconstitutional because it effectively prohibits any adult bookstores from locating in the City of Warren.

The Magistrate did not address the issue of the sufficiency of the factual justification or the question of whether the ordinance acted to prohibit adult bookstores from locating in Warren. Rather, the Magistrate addressed only the question of vagueness, and found that the ordinance was, in fact, vague. The Magistrate therefore recommended that the Court issue a preliminary injunction, enjoining the City of Warren from enforcing the provisions of Section 14.02(c) of the Warren zoning ordinance against the plaintiff. Upon consideration, the Court rejects the Magistrate's recommendation. The Court will discuss each of the challenges in the order listed above.

A. *Vagueness and Overbreadth*

[**10**] Plaintiff challenges the Warren zoning ordinance's definition of an adult bookstore because that definition uses the terms "substantial or significant portion" of its stock in trade when specifying what types of bookstores are adult bookstores. The Court is of the opinion that this definition is reasonably specific and precise, "bearing in mind that unavoidable imprecision is not fatal and celestial precision is not necessary." *Hart Book Stores, Inc. v. Edmisten,* 612 F.2d 821, 833 (4th Cir. 1979), *cert. denied* 447 U.S. 929, 100 S.Ct. 3028, 65 L.Ed.2d 1124 (1980). The language of the Warren ordinance is derived from the language found in the Detroit ordinance upheld in *Young v. American Mini Theatres,* 427 U.S. 50, 96 S.Ct. 2440, 49L.ed.2d .ed.2d 310 (1976). Although the Supreme Court did not address the vagueness issue in *Young,* similar language was found to be sufficiently precise in *Hart Book Stores, Inc. v. Edmisten, supra. See also Nortown Theatre Incorporated v. Gribbs,* 373 F.Supp. 363 (E.D.Mi. 1974), *rev'd sub nom American Mini Theatres Inc. v. Gribbs,* 518 F.2d 1014 (6th Cir.1975), *rev'd sub nom Young v. American Mini Theatres Inc.,* 427 U.S. 50, 96 S. Ct. 2440, 49 L.Ed.2d 310 (1976). Moreover, each term is "readily subject to a narrowing construction by the state courts." *Young, supra,* 427 U.S. at 61, 96 S.Ct. at 2448.

It is a logical possibility for a statute to be precise in language, yet overbroad. A challenge on the basis of overbreadth raises two questions: whether the language of the statute reaches too broadly and proscribes protected conduct, and whether too much discretion is vested in the officials who administer the statute. *Broadrick v. Oklahoma,* 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). The Court finds that the language of the Warren zoning ordinance is not substantially overbroad, but will defer addressing the question of escessive administrative discretion until later in this opinion.

In summary, the Court will not invalidate the Warren zoning ordinance on vagueness or overbreadth grounds.

B. *The Factual Justification of the Zoning Ordinance*

[11] It is clear that if a zoning ordinance regulating adult bookstores is to be upheld as constitutional, the local government must factually justify its need to regulate adult bookstores. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310(1976). There is no requirement, however, for a city to conduct its own research in this area. In fact, the City need not await deterioration in order to act, and is entitled to rely on the experience and findings of other legislative bodies as a basis for action. *C.L.R. Corp. v. Henline,* 702 F.2d 637 (6th Cir.1983); *Genusa v. City of Peoria,* 619 F.2d 1203 (7th Cir. 1980).

[12] At the preliminary injunction hearing, defendant offered to conduct surveys and research to justify the zoning ordinance. Such after the fact research is irrelevant, for the question under *Young* is what the legislature considered when enacting the ordinance. Nevertheless, there is no evidence that the Warren City Council enacted the ordinance in response to the proposed opening of an adult entertainment facility. The evidence does show that the Warren ordinance was held under advisement for a lengthy period of time while the courts considered the validity of the Detroit zoning ordinance in *Young v. American Mini-Theatres.* Indeed, to a substantial degree, the Warren ordinance resembles the ordinance approved proved in *Young.* The Court believes that the Warren City Council's reliance on the Detroit experience is a sufficient factual justification for the ordinance.

C. *The Zoning Ordinance as a Prohibition*

[13-15] There are 85 sites in the City of Warren which satisfy the distance requirements of the zoning ordinance. Mr. Toth testified that many of the 85 sites were not commercially practicable. It would be unconstitutional for a municipality to zone adult uses into swamps, warehouses, and shipyards, where there are few access roads, and the locations are poorly lit and

perhaps unsafe. *Basiardanes v. City of Galveston,* 682 F.2d 1203 (5th Cir. 1982). The evidence in this case does not show a deliberate effort to zone the adult bookstore into a set of commercially impracticable sites. The 85 sites which satisfy the distance requirements of the ordinance represent a wide variety of locations. The fact that plaintiff may not be able to afford the renovation or construction of certain buildings does not persuade the Court of the invalidity of the ordinance, for the Court does not believe the City is required to provide sites which assure the commercial success of an adult bookstore. The distance requirements of the zoning ordinance are not prohibitory, and are therefore constitutional. *Young v. American Mini-Theatres Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976).

[**16, 17**] The application procedure for a special land use permit and site plan approval leaves an improper degree of discretion in the local officials. *Entertainment Concepts Inc. III v. Maciejewski,* 631 F.2d 497 (7th Cir. 1980), *cert. denied* 450 U.S. 919, 101 S.Ct. 1366, 67 L.Ed.2d 346 (1981). It is instructive that the ordinance approved in *Young v. American Mini-Theatres Inc., supra,* did not contain a special land use permit procedure. In the instant case, the lack of time limits governing the Commission and the Board of Zoning Appeals' decision, and the indefinite general standards guiding the Commission and Board's discretion, raise the possibility that local officials could effectively prohibit any adult entertainment facility. For there to be an effective permit requirement, a municipality must provide narrowly drawn, objective, reasonable, and definite standards to guide the administering officials. *Shuttlesworth v. Birmingham,* 394 U.S. 147, 151, 89 S.Ct. 935, 938, 22 L.Ed.2d 162 (1969).

[**18**] In contrast, the Court does not find that the discretion vested in various bodies for approving the special uses in the City Center District is unconstitutional, since the City needs the ability to require special permits for a small area of historical or cultural importance to the community.

Therefore, the Court finds unconstitutional the special land use procedure and site plan review procedure described in Warren Zoning Ordinance Section 14.02, as it applies to adult bookstores which do not locate in the City Center District. Given that this permit procedure is the only unconstitutional aspect of defendant's zoning ordinance, the Court must determine if it is proper to sever that requirement from the rest of defendant's zoning ordinance. The question of severability turns on a determination of legislative intent. *Champlin Refining Company v. Corporation Commission,* 286 U.S. 210, 52 S.Ct. 559, 76 L.Ed. 1062 (1932). In the instant case, there is a severability clause which provides that "If any part, sentence, paragraph, section or clause is adjudged unconstitutional or invalid, it is hereby provided that the remainder of the ordinance shall not be affected thereby." (Article XXVI, Warren Zoning Ordinance.)

Because the severability clause is such a strong indication of legislative intent, the Court finds that the zoning ordinance does stand alone if the special land use permit and site plan review procedure described in Warren Zoning Ordinance Section 14.02, as it applies to adult bookstores which are not located in the City Center District, is severable from the rest of the ordinance. The effect of this severance would be that outside the City Center District, an adult bookstore could locate as of right only in C-2, C-3, M-1 and M-2 zones, and only so long as none of the following conditions are found to exist:

(a) The site is located on other than a major thoroughfare, as designated in the Master Thoroughfare Plan.

(b) The site is closer than 500 feet to the property line of an area zoned residential or a residential use.

(c) The site is located closer than 1,000 feet to a site having an adult business designation under this section or closer than 1,000 feet to the property line of any church or private or public school.

These spatial restrictions may also be waived if 51% of the persons owning, residing, or doing business within 500 feet of the adult business approve that use through a petition of notarized signatures.

The standards for issuing a preliminary injunction are delineated in *Mason County Medical Assoc. v. Knebel,* 563 F.2d 256 (6th Cir. 1977). The Court finds that plaintiff has satisfactorily shown the existence of the factors which are necessary for the issuance of a preliminary injunction enjoining the defendant from enforcing the special land use procedure and site plan review procedure described in Warren Zoning Ordinance Section 14.02 as it applies to adult bookstores which are not located in the City Center District. Accordingly, the plaintiff's motion for preliminary injunction is GRANTED IN PART, and it is HEREBY ORDERED that the defendant, City of Warren, be enjoined and restrained from enforcing the special land use procedure and site plan review procedure described in Warren Zoning Ordinance Section 14.02, as it applies to adult bookstores which are not in the City Center District, pending a full adjudication on the merits. The effect of this injunction on the Warren Zoning Ordinance and its regulation of adult bookstores is described in the preceding paragraph. In all other respects, the motion for preliminary injunction is DENIED.

VIII. *Plaintiff's and Defendant's Motion for Summary Judgment*

The parties' motions for summary judgment are framed in response to the issues raised by the Magistrate's recommendation. The Court's present opinion has placed this case in a substantially different legal context, and the Court will defer ruling on the respective motions for summary judgment. The Court directs the parties to file supplemental motions for summary judgment accompanied by briefs within 30 days of this opinion. Each party will then have 30 days to respond to the opponent's motion for summary judgment.

IX. *Conclusion*

Accordingly, for the reasons stated, the Court rules as follows:

1. Plaintiff's motion to amend is GRANTED;

2. Defendant's motion to abstain is DENIED;

3. Defendant's motion to dismiss is DENIED;

4. Defendant's motion to disqualify Gregory Fischer Lord as plaintiff's attorney is DENIED AS MOOT;

5. Plaintiff's motion to take notice of adjudicative fact is DENIED;

6. Plaintiff's motion for preliminary injunction is GRANTED IN PART and DENIED IN PART;

7. Plaintiff's motion for summary judgment is DEFERRED; and

8. Defendant's motion for summary judgment is DEFERRED.

The terms of the preliminary injunction are set forth in Section VII of this opinion.

IT IS SO ORDERED.

IN THE COURT OF APPEALS OF
THE STATE OF MICHIGAN

CITY OF WARREN, a municipal corporation, *Plaintiff-Appellee,* *vs.* MICHIGAN DIVERSIFIED BUSINESS PRODUCTS, INC., *Defendant-Appellant.*	No. 72495
MICHIGAN DIVERSIFIED BUSINESS CORP., d/b/a DANISH ADULT NEWS, d/b/a MEL-O-DEE RECORDS AND TAPES, *Plaintiffs-Appellants,* *vs.* GEORGE O. BRUGGEMAN and PATRICK J. SANKEUR, and CITY OF WARREN, a municipal corporation, *Defendants-Appellees.*	No. 72496

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Michigan Diversified Business Properties, Inc., the Appellant above-named in Case No. 72495, and Michigan Diversified Business Corp., d/b/a Danish Adult News, d/b/a Mel-O-Dee Records and Tapes, the Appellants above-named in Case No. 72496, hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of Michigan, affirming

judgment for Plaintiff-Appellee in Case No. 72495, and affirming judgment for Defendants-Appellants in Case No. 72496, entered on August 16, 1984.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

MICHAEL NULL
Counsel for Appellants

MICHAEL NULL
155 N. Michigan Avenue
Suite 700
Chicago, Illinois 60601
(312) 565-2570

PROOF OF SERVICE

MICHAEL NULL, attorney for Appellants, certifies that he served a copy of the above and foregoing Notice of Appeal to the Supreme Court of the United States upon all parties required to be served by depositing a copy of same in the United States Post Office located at 151 East Lake Street, Chicago, Illinois 60601 before the hour of 5:00 p.m., this 28th day of August, 1985, with proper postage prepaid, addressed to the following:

David L. Dalenberg, Esq
Assistant City Attorney
City of Warren, Michigan
29500 Van Dyke Avenue
Warren, Michigan 48093

MICHAEL NULL
Michael Null

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN. Held at the Supreme Court Room in the City of Lansing, on the 3rd day of June in the year of our Lord one thousand nine hundred and eighty-five.

Present the Honorable

G. MENNEN WILLIAMS,
Chief Justice

CHARLES L. LEVIN,
JAMES L. RYAN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DOROTHY COMSTOCK RILEY,
Associate Justices

75244
75245

CITY OF WARREN, a Municipal Corporation,

Plaintiff-Appellee,

v

MICHIGAN DIVERSIFIED PROPERTIES, INC.,

Defendant-Appellant.

SC: 75244, 75245
COA: ~~72495~~, 72496
LC: 78-266942, 78-6375

MICHIGAN DIVERSIFIED BUSINESS CORP., d/b/a DANISH ADULT NEWS, d/b/a MEL-O-DEE RECORDS AND TAPES,

Plaintiff-Appellant,

v

GEORGE O. BRUGGEMAN, PATRICK J. SANFEUR, and CITY OF WARREN, a Municipal Corporation,

Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

0528

STATE OF MICHIGAN -- ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 3rd day of June in the year of our Lord one thousand nine hundred and eighty-five.

Corbin R. Davis Clerk

85-353

Supreme Court, U.S.
FILED
OCT 2 1985
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

MICHIGAN DIVERSIFIED BUSINESS PRODUCTS, INC., and MICHIGAN DIVERSIFIED BUSINESS CORP., d/b/a DANISH ADULT NEWS, d/b/a MEL-O-DEE RECORDS AND TAPES,
Appellants

vs.

CITY OF WARREN, GEORGE O. BRUGGEMAN and PATRICK J. SANKUER,
Appellees.

BEST AVAILABLE COPY

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS

MOTION TO DISMISS

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October 2, 1985

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INDEX

	Page
CITATIONS	ii
MOTION TO DISMISS	1
STATEMENT	1
ARGUMENT	4
CONCLUSION	6

CITATIONS

Cases: **Page**

Tileston v. *Ullman*, 318 U.S. 44, 87 L Ed 603, 63 S.Ct. 493 (1943) 5

United States v. *Raines*, 362 U.S. at 22, 4 L Ed 2d 524, 80 S.Ct. 519 5

Warth v. *Seldin*, 442 U.S. 490, 499, 45 L Ed 343, 95 S.Ct. 2197 (1975) 5

Ordinances:

City of Warren Zoning Ordinances:

Section 14.02(C)(2) 2, 3, 4

Section 20.07 3

Section 21.06(c) 3

Section 22.14 3

State Laws:

Michigan Compiled Laws, Section 125.581, et seq. .. 1

Section 125.584(c) 3

Section 125.584(d) 3, 4

Section 125.587 2

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1985

MICHIGAN DIVERSIFIED BUSINESS PRODUCTS, INC., and MICHIGAN DIVERSIFIED BUSINESS CORP., d/b/a DANISH ADULT NEWS, d/b/a MEL-O-DEE RECORDS AND TAPES,
Appellants

vs.

CITY OF WARREN, GEORGE O. BRUGGEMAN and PATRICK J. SANKUER,
Appellees.

ON APPEAL FROM THE MICHIGAN
COURT OF APPEALS

MOTION TO DISMISS

Appellees, pursuant to Rule 16.1(b) of the Rules of the Supreme Court of the United States, move the Court to dismiss the appeal herein for the reasons and on the grounds hereinafter set forth.

STATEMENT

This is an appeal from a judgment of the Court of Appeals for the State of Michigan upholding an injunction issued by the Macomb County Circuit Court enjoining Appellants from operation of any of the proposed adult uses until it has complied with the City of Warren ordinances. The facts underlying the appeal are as follows:

The City of Warren adopted its Zoning Ordinance on July 21, 1960, pursuant to the Michigan Zoning Enabling Statute, MCL 125.581, et seq. Subsequently, the City adopted amendments, including the requirement of special use approval for a number of commercial uses. The uses

relevant to this litigation include: massage establishments, whirlpool baths, escort services and nude body painting or modeling studios. In 1978, the City added adult bookstores, adult mini-motion picture theaters, and adult motion picture theaters as uses requiring approval but imposed an additional requirement not applicable to the other uses. The additional requirement provides that the site must be set back from residential properties, other adult businesses, churches and schools, and must be located on a major thoroughfare. (App. 10a) A site not meeting these setback criteria will not be required to apply for special use approval, Warren Zoning Ordin. 14.02C(2).

The City of Warren commenced an action in the County Circuit Court to enjoin a violation of its Zoning Ordinance pursuant to the Michigan statute authorizing abatement of zoning ordinance violations as a nuisance per se (MCL 125.587). (App. 9a) The City claimed that the Appellants had obtained a Certificate of Occupancy for an "office," "portrait studio," "retail sales of tapes and records" at the property site, but conducted certain adult uses different from the Certificate of Occupancy without first submitting a site plan application or special use application pursuant to Section 14.02 of the City ordinance. The City claimed that the Certificates of Occupancy were fraudulently obtained and, therefore, Appellants occupied the premises without the required Certificate of Occupancy for adult uses, making the use a nuisance per se under Michigan statute. Contrary to Appellants' statement of the case in their Jurisdictional Statement, no countercomplaint was filed that alleged that Section 14.02's special use requirement is unconstitutional.

The Circuit Court determined that Appellants failed to comply with the twofold requirements of Warren Zoning Ordin. 14.02C(2), which include: (1) submission of site plan for spatial measurements and site development approval, and (2) submission of special use approval application for approval of the proposed uses.

Diversified's challenge to the validity of the special use approval procedure was raised by Diversified in its appeal to the Michigan Court of Appeals. No attack was made on the spatial requirements of Section 14.02C(2) as they would apply to Diversified's location.

Diversified is located in a district classified C-2 by Warren, within 100 feet of residentially zoned (R-1-C) property. Under Section 14.02 of the Warren Zoning Ordinance, adult businesses, as defined therein, are permitted to locate in C-2 districts subject to the distance requirements measured from the site plan submitted by petitioner. Diversified stipulated at trial that it has not submitted the required site plan application or the application for special use approval, and further stipulated that it intended to conduct "adult businesses" as defined in the ordinance.

As written and as implemented, the Warren Zoning Ordinance requires an applicant for an adult use to submit a site plan application as a prerequisite to submitting an application for special use approval in order to determine whether the spatial limitations provided therein would apply to the applicant's property. This procedure is a prerequisite because if said property did not comply with the spatial restrictions mandated by 14.02C(2), then it would be futile to submit application for special use approval. (App. 10a)

If a special use approval was required before April 12, 1983, application must be presented to the City Planning Commission and the Board of Appeals for approval under Section 14.02. Certain criteria and standards for review of an application were provided in Sections 14.02, 21.06 and 20.07 of the Warren Zoning Ordinance. Additional standards are provided in MCL 125.584(c). (App. 7a) On April 12, 1983, the Warren Zoning Ordinance was amended to provide for approval by the legislative body, after recommendation of the Planning Commission. Furthermore, the amendment provides more detailed standards for the approval of a special use in new Section 22.14. This amendment was adopted pursuant to the requirements of changes in the Enabling

Act, MCL 125.584(c), 125.584(d). (App. 7a and 8a) The standards set forth in Sections 14.02, 20.07, 21.06(c), and 22.14 provide sufficient standards for consideration of an application for special use approval.

On November 17, 1981, Appellants commenced an action in the U.S. District Court seeking declaratory and injunctive relief against Appellees herein, *Michigan Diversified Business Corp. v City of Warren, et al.*, 81-30097. On June 18, 1982, the District Court granted Appellees' Motion to Dismiss on the grounds of abstention, ruling that the State Court is competent to resolve questions of federal constitutional law.

In a State Court case involving the same property, the Macomb County Circuit Court declared the premises a public nuisance and ordered the southerly portion of the premises closed under MCL 600.3820 and MCL 600.3825. This decision was upheld by the Michigan Court of Appeals in *State ex rel Macomb County Prosecuting Atty. v Mesk*, 123 Mich App 111, leave denied in 417 Mich 1031 (1983).

ARGUMENT

The appeal herein fails to present a substantial federal question for the reason that Appellants have failed to present facts in the lower court which support their standing to challenge the special use approval requirement of the Warren ordinance. The testimony and exhibits offered by the parties herein clearly demonstrate the undisputed fact that Appellants' property is located within 100 feet of property zoned residential. Under the plain language of Section 14.02C(2) of the Zoning Ordinance, a site plan (if submitted by Appellants) could not be approved. The requirement for site plan submission and approval "before authorization of a land use or activity" is expressly provided by provisions of Michigan Statute. MCL 125.584(d)(2). (App. 8a) Without compliance with the 500 foot setback provision, Appellants would not be required to submit application for special use

approval. Therefore, as argued below, Appellants lack standing to raise the issue of the validity of the special use approval procedure in the Warren ordinance. Appellants may not assert the legal rights or interests of third parties who may be required to seek special use approval, *Warth v Seldin*, 422 US 490, 499, 45 L Ed 2d 343, 95 S Ct 2197 (1975), *Tileston v Ullman*, 318 US 44, 87 L Ed 603, 63 S Ct 493 (1943). As this Court has previously held, the reason for this rule is two-fold. The limitation "frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy," *United States v Raines*, 362 US, at 22, 4 L Ed 2d 524, 80 S Ct 519, and it assures the Court that the issues before it will be concrete and sharply presented. Since Appellants have failed to demonstrate to this Court that a "case" or "controversy" exists as required under Article III of the United States Constitution, it is clear that a substantial federal question has not been presented.

Even if Appellants could present facts that provide standing for raising this issue, an additional question of ripeness is presented by the facts in this case. The U. S. District Court for the Eastern District of Michigan is presently deciding whether the same ordinance provisions are valid and enforceable in *15192 Thirteen Mile Road, Inc., et al. v City of Warren*, D.C. No. 84 CV9798PH. It is clear that the U.S. District Court's decision on the preliminary request for injunction and the opinion cited by Appellants is not a "final adjudication" on the merits. The parties are presently awaiting the findings and decision of the District Court in this case. Appellants attempt to urge this Court to review the State Court decision, while the same issue is awaiting a decision in the U.S. District Court, is an attempt to invoke the jurisdiction of this Court before the issue is ripe for decision.

CONCLUSION

For the foregoing reason that Appellants lack standing to challenge the special use approval, Appellees move that this appeal be dismissed.

Respectfully submitted,
David L. Dalenberg (P12451)
Senior Assistant City Attorney
Attorney for Appellees
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(313) 574-4671

Dated: October 2, 1985.

APPENDIX

APPENDIX TABLE OF CONTENTS

	Page
Memorandum Opinion and Order dated June 18, 1982, of the United States District Court, Eastern District of Michigan, Southern Division, in *Michigan Diversified Business Corp., et al.* v. *City of Warren, et al.*, Civil No. 81-30097	1a
Opinion of the Michigan Circuit Court for the County of Macomb dated April 10, 1981, in *State Ex Rel, George N. Parris Macomb County Prosecuting Attorney* vs. *H. C. Mesk, et al*, File No. 80-2297-CZ	4a
Michigan Zoning Enabling Act, MCL 125.584(c)	7a
Michigan Zoning Enabling Act, MCL 125.584(d)	8a
Michigan Zoning Enabling Act, MCL 125.587	9a
Warren Zoning Ordinance, as amended, Sections 14.02, 20.07, 22.01, 22.03, 22.09, 22.10, 22.11, 2.68, 2.69, 22.14	10a

Memorandum Opinion and Order

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN DIVERSIFIED BUSINESS CORP., et al,
Plaintiff,

v

Civil No. 81-30097

CITY OF WARREN, et al,
Defendants.

MEMORANDUM OPINION AND ORDER

At a session of said court held in the Federal Building, Bay City, Michigan on the 18th day of June, 1982

PRESENT: HONORABLE JAMES HARVEY
United States District Judge

Plaintiff, which owns and operates an economic enterprise offering certain types of entertainment, brought this action to challenge the constitutionality of a zoning ordinance of the City of Warren, Michigan, and the actions of various city officials thereunder. Plaintiff seeks a declaratory judgment and injunctive relief. The matter is before the Court on defendants' motion to dismiss.

As defendants point out, and as plaintiff admits in its complaint, the claims raised in this action are also the subject matter of two cases filed in 1978 and currently pending in the Macomb County Circuit Court. *See City of Warren v Michigan Diversified Business Corp et al,* No. 78-2669-CZ and *Michigan Diversified Business Corp et al v City of Warren et al,* No. 78-6275-CZ. For this reason, defendants have requested that the Court "abstain from accepting jurisdiction in this action and dismiss plaintiff's claim."

The present motion is governed by the principles enunciated by the Supreme Court in *Colorado River Water Conservation District v United States*, 424 US 800 (1976) and *Will v Calvert Fire Ins Co*, 437 US 655 (1978), and endorsed by the Sixth Circuit in *Northwood Apartments v LaValley*, 649 F2d 401, 407 (CA 6, 1981). In *Colorado River* the Court created a new theory of "abstention" which recognized that in some cases, it is appropriate for a federal court to abstain from accepting jurisdiction over an action, where to do so would avoid litigation which would be duplicative of an action already commenced in state court. Previous to this decision, the doctrine of abstention was considered appropriate only in the following circumstances: where there exists unsettled questions of state law which, if settled by the state, would avoid the necessity of deciding the matter on a federal constitutional ground, *Railroad Comm'n of Texas v Pullman Co*, 312 US 496 (1941); where accepting jurisdiction would create needless conflict with state policies in areas of basic concern to the states, and federal adjudication in the area would disrupt state efforts to establish its own policy with respect to matters of substantial concern, *Burford v Sun Oil Co*, 319 US 315 (1943); and where accepting jurisdiction would frustrate a pending state court proceeding, in derogation of the principles of comity and federalism. *Younger v Harris*, 401 US 37 (1971).

In *Colorado River* it was held that "consideration of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation," are the principles which govern this new theory of abstention. 424 US at 817. It was recognized that while federal courts have an "unflagging obligation . . . to exercise the jurisdiction given them," there are circumstances which exist which make abstention the more appropriate course of action. *Id.* at 817-818. "The decision in such circumstances is largely committed to the discretion of the district court," *Will v Calvert Fire Ins Co*, 437 US at 664, which must take into account several factors in reaching its decision, but

"the general principle is to avoid duplicative litigation." *Colorado River,* 424 US at 817-818.

In the present case, nearly all factors to be considered counsel against concurrent federal proceedings. The state action was commenced long before the federal suit. *See Donovan v City of Dallas,* 377 US 408 (1964). The essence of both actions involves questions and policies of state law, as well as federal law, which should not be handled by means of piecemeal litigation. *Cf. Brillhart v Excess Ins Co,* 316 US 491 (1942). The state court is certainly competent to resolve questions of federal constitutional law. *See England v Louisiana Medical Examiners,* 375 US 411 (1964). There is an element of practical inconvenience, in terms of distance, associated with the federal forum. *Cf. Gulf Oil Corp v Gilbert,* 330 US 501 (1947). And finally, the plaintiff is seeking purely equitable relief and not monetary damages. *Will v Calvert Fire Ins Co, supra, Brillhart v Excess Ins Co, supra.*

For all these reasons, the Court, in its discretion, hereby GRANTS defendants' motion. Accordingly, this action is hereby DISMISSED.[1]

IT IS SO ORDERED.

(s) JAMES HARVEY
United States District Judge

[1] The Court recognizes that given the doctrines of res judicata and collateral estoppel, the "practical effect" of this Court's grant of defendants' motion is to actually dismiss the action rather than merely stay its hand. *See* 17 Wright & Miller, *Federal Practice and Procedure* § 4247 at 517-519. Therefore, the Court has decided to expressly so frame the present order as a dismissal.

Circuit Court for the County of Macomb Opinion

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF MACOMB

STATE EX REL, GEORGE N. PARRIS
MACOMB COUNTY PROSECUTING ATTORNEY,

Plaintiff,

-vs- File No. 80-2297-CZ

H. C. MESK, believed to be known as
HELEN C. MESK, and SMR CORPORATION
d/b/a GORDON STUDIOS,

Defendants.

OPINION

This matter involves an action by the Macomb County Prosecuting Attorney to abate an alleged public nuisance pursuant to MCL 600.3801 *et seq*. The cited statute declares that any "building — or place" used for the purpose of "lewdness, assignation or prostitution" may be enjoined and abated as provided elsewhere in the statute. MCL 600.3805 allows the prosecuting attorney to commence such actions.

The matter at bar has an extensive history. On May 21, 1980, this Court issued an opinion covering the case to that date and further holding that the harsh remedy of abatement by closure was too severe at that juncture. However, defendants were enjoined from permitting the occurrence of any further activities prohibited under MCL 600.3801 at their facilities. The parties were advised that any violation of this injunction would result in an immediate order of closure.

Commencing December 16, 1980, a trial was held in this matter. At that trial, Deputy Warren Lamb testified that, on July 16, 1980, he went to the premises in question and engaged a model for a massage. Lamb claims that he paid

the woman $30.00 for a "hand job" i.e., digital stimulation of his penis by the model. Upon the model's acceptance of the money, Lamb identified himself and arrested the woman. The woman denies these allegations. The Court finds the officer's testimony to be the truth of the matter.

On November 11, 1980, a similar scenario occurred involving Deputy Al Sawaya. The price offered was $50.00.

Again, on November 28, 1980, police officer E.J. Smith was offered a "hand job" and a "blow job" (fellatio) by a female model. The price offered was $75.00.

It seems apparent that the order of the Court, dated May 21, 1980 meant little or nothing to the defendants therefore.

Defendants contend that they have attempted to rid the premises of "models" engaging in acts of prostitution. The evidence speaks otherwise. It should also be noted that there is adequate testimony to support the court's decision herein without ruling on the search and seizure questions.

Defendants contend at page 3 of their post-trial brief that they were unaware of continuing acts of prostitution. Yet, at page 4, they concede actual knowledge of such events in the past. The overall logic of their argument regarding lack of actual knowledge is therefore less than convincing to say the least.

Defendants contend that numerous hotels, businesses, and parks would have to be closed, if only a few acts of prostitution are needed to invoke the padlock act. The argument is an exercise in speculation, since no one knows the quantum of immorality that is exactly required to invoke the act. Such decisions are best left to the discretion of the executive arm of government. The function of the judiciary is to determine whether the act was properly invoked. Given the recurrent pattern of acts shown herein, the Court finds that the Prosecuting Attorney has not abused his discretion in this case.

Whether or not the defendants actually knew of these acts is irrelevant inasmuch as MCL 600.3815(2) obviates any necessity to show proof of actual knowledge on the part of the landowner.

Insofar as the question of proof of the reputation of the facility is concerned, it is plain that MCL 600.3815(1) connotes a permissive use of general reputation as an element of proof. The same is clearly not an indispensible element of a padlock action.

It is clear that, despite the earlier order of this Court, acts of prostitution have continued unabated at the subject premises. The only solution is to abate the nuisance itself.

An order of abatement consistent with the provisions of MCL 600.3801 *et seq* will enter upon notice and presentment.

Dated: April 10, 1981

(s) KENNETH N. SANBORN
Circuit Judge

cc: Thomas Landy
Noel L. Lippman
William W. Swor

MCL 125.584(c)

Specifications of requirements and standards of decision specified in ordinances; extent of standards, request, compliance, approval.] SEC. 4c. (1) If a city or village zoning ordinance authorizes the consideration and approval of special land uses or planned unit developments pursuant to sections 4a or 4b, or otherwise provides for discretionary decisions, the requirements and standards upon which the decisions are made shall be specified in the ordinance. The standards shall be consistent with, and promote the intent and purpose of the zoning ordinance, and insure that the land use or activity authorized shall be compatible with adjacent uses of land, the natural environment, and the capacities of public services and facilities affected by the land use. The standards shall insure that the land use or activity is consistent with the public health, safety, and welfare of the city or village. A request for approval of a land use or activity which is in compliance with the standards stated in the zoning ordinance and the conditions imposed thereunder, other applicable ordinances, and state and federal statutes shall be approved.

Approval of special land use, planned unit development or other land uses or activities, reasonable conditions, requirements.] (2) Reasonable conditions may be required in conjunction with the approval of a special land use, planned unit development or other land uses or activities permitted by discretionary decision. The conditions may include, conditions necessary to insure that public services and facilities affected by a proposed land use or activity will be capable of accommodating increased service and facility loads caused by the land use or activity, to protect the natural environment and conserve natural resources and energy, to insure compatibility with adjacent uses of land, and to promote the use of land in a socially and economically desirable manner. Conditions imposed shall do all the following:

(a) Be designed to protect natural resources, the health, safety, and welfare, as well as the social and economic well-

being of those who will use the land use or activity under consideration, residents and landowners immediately adjacent to the proposed land use or activity, and the community as a whole.

(b) Be related to the valid exercise of the police power and purposes which are affected by the proposed use or activity.

(c) Be necessary to meet the intent and purpose of the zoning regulations; be related to the standards established in the ordinance for the land use or activity under consideration; and be necessary to insure compliance with those standards.

Conditions, recording.] (3) The conditions imposed with respect to the approval of a land use or activity shall be recorded in the record of the approval action and shall remain unchanged except upon the mutual consent of the approving authority and the landowner. The approving authority shall maintain a record of changes granted in conditions.

MCL 125.584(d)

Site plan, inclusions.] SEC. 4d. (1) As used in this section, "site plan" includes the documents and drawings specified in the zoning ordinance necessary to insure that a proposed land use or activity is in compliance with the local ordinance and state and federal statutes.

Submission and approval, specifications of zoning ordinances.] (2) A city or village may require the submission and approval of a site plan before authorization of a land use or activity regulated by a zoning ordinance. The zoning ordinance shall specify the body, board, or official charged with reviewing site plans and granting approval.

Record of approval.] (3) If a zoning ordinance requires site plan approval, the site plan, as approved, shall become part of the record of approval, and subsequent actions relating to the activity authorized shall be consistent with the

approved site plan, unless a change conforming to the zoning ordinance receives the mutual agreement of the landowner and the administrative official or body which initially approved the site plan.

Procedure and requirements, specifications.] (4) The procedures and requirements for the submission and approval of site plans shall be specified in the zoning ordinance. Site plan submission, review, and approval shall be required for special land uses and planned unit developments. Decisions rejecting, approving, or conditionally approving a site plan shall be based upon standards and requirements contained in the zoning ordinance.

Approval, conditions.] (5) A site plan shall be approved if it contains the information required by the zoning ordinance and is in compliance with the zoning ordinance and the conditions imposed thereunder, other applicable ordinances and state and federal statutes.

MCL 125.587

SEC. 7. Buildings erected, altered, razed or converted, or uses carried on in violation of ♦ local ordinances or regulations made ♦ [pursuant to] this act are ♦ declared to be a nuisance per se. The court shall order [the] nuisance abated, and the owner ♦ or agent in charge of [the] building or land, [or both the owner and the agent,] shall be adjudged guilty of maintaining a nuisance per se. The legislative body ♦ in the ordinance enacted ♦ [pursuant to] this act [shall] designate the proper officials whose duty it shall be to [administer and] enforce the ♦ ordinance and provide penalties for the violation ♦ [of the ordinance].

SECTION 14.02 — WARREN ZONING ORDINANCE

Section 14.02. Approval of Special Land Use Permit — Under such conditions as the City Council, after recommendation of the Planning Commission, finds the use meets the standards of approval set forth in Section 22.14 of the Ordinance and subject to the conditions that may be imposed, the following uses may be permitted:

* * *

"C. Adult Businesses — including but not limited to the following: Adult bookstores, adult motion pictures, adult mini motion pictures, nude body painting or modeling studios, and escort services.

1. **Definitions.**

a) **Adult Bookstore.** An establishment having a substantial or significant portion of its stock in trade, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Special Anatomical Areas', (as defined below), or an establishment with a segment or section devoted to the sale or display of such material.

b) **Adult Motion Picture Theater.** An enclosed building with a capacity of fifty or more persons used for presenting material having as a dominant theme materials distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Special Sexual Activities' or 'Specified Anatomical', (as defined below), for observation by patrons therein.

c) **Adult Mini Motion Picture Theater.** An enclosed building with a capacity with less than fifty persons used for presenting materials distinguished or characterized by an emphasis on

matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas', (as defined below) for observation by patrons therein.

d) **Nude Body Painting or Modeling Studio.** An establishment which provides the services of body painting of the human body or (as defined below) are offered for observation of the patrons therein."

e) **Escort Service.** An establishment which provides the services of escorting members of the opposite sex for payment of a fee.

f) **Specified Sexual Activities, Specified Anatomical Areas.** For the purpose of this Section 'Specified Sexual Activities' is defined as:

(1) Human genitals in a state of sexual stimulation or arousal.

(2) Acts of human masturbation, sexual intercourse or sodomy.

(3) Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

And, 'Specified Anatomical Area' is defined as:

(1) Less than completely and opaquely covered;

(a) Human genital, pubic region,
(b) Buttock, and
(c) Female breast below a point immediately above the top of the areola; and

(2) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

2. **Site Plan Review.**

Application to establish an adult business shall be made in writing to the Planning Commission. Such application shall specify the type of adult use or uses that will be catered to, and shall be accompanied by a detailed site plan.

The Planning Commission, having a duty to determine whether a particular use will have a deleterious effect on the surrounding area, will not approve a site plan application if any of the following conditions are found to exist:

a) The site is located on other than a major thoroughfare, as designated in the Master Thoroughfare Plan.

b) The site is closer than 500 feet to the property line of an area zoned residential or a residential use.

c) The site is located closer than 1000 feet to a site having an adult business designation under this section or closer than 1000 feet to the property line of any church or private or public school.

20.07 STANDARDS.

Whenever in this ordinance the lawful exercise or existence of a use requires the approval of the Board of Appeals, the Board shall be guided by the following standards:

1. Whether there is proper yard space, parking facilities, loading space and storage space to adequately carry on the use contemplated.

2. Whether the location and size of the proposed use, the nature and intensity of the principal use and all accessory uses, the site layout and its relation to

streets giving access to it shall be such that traffic to and from the use or uses, and the assembly of persons in connection herewith, will not be hazardous or inconvenient to the neighborhood nor unduly conflict with the normal traffic of the neighborhood.

3. Whether or not the proposed use will have a detrimental effect on the health, peace, safety and welfare of persons residing in the surrounding neighborhood.

Section 22.01 ENFORCEMENT.

It shall be unlawful to build or use or permit the building or the use of any structure or land or part thereof hereafter created, erected or altered or change or enlarge the use of any building or land or part thereof until a building permit in accordance with the provisions of this Ordinance, properly endorsed as to occupancy in a manner herein provided, shall have been issued by the Building Department.

22.03 DUTIES OF BUILDING DEPARTMENT.

The Building Department shall have the power to grant occupancy permits, to make inspections of buildings or premises necessary to carry out its duties in the enforcement of this Ordinance. It shall be unlawful for the Building Inspector to approve any plans, or to issue any permits for any excavation or construction until he has inspected such plans in detail and found them to conform with this Ordinance. . .

22.09 ZONING INSPECTION FOR BUILDING AND LAND USE.

It shall be the duty of the holder of every permit to notify the Building Department of the time when such buildings will be ready for inspection. Two (2) such inspections shall be requested on all buildings.

The first of these inspections shall be requested when excavation for foundations has been completed, and the second inspection shall be requested when the building is completed.

22.10 CERTIFICATE OF OCCUPANCY.

No land or building hereafter erected or altered shall be occupied, used or changed in use until a Certificate of Occupancy shall have been issued by the Building Department stating that the land or building or proposed use of a building or land complies with all the building and City and County health laws and ordinances and the provisions of this and other applicable ordinances.

22.11 APPLICATION FOR CERTIFICATE OF OCCUPANCY.

Certificates of Occupancy shall be applied for coincident with the application for a building permit and shall be issued within ten (10) days after the erection or alteration of such building or the use of land shall have been completed in conformity with the provisions of these regulations. A record of all such certificates shall be kept on file in the office of the Building Department and copies shall be furnished on request to any person having a proprietary or tenancy interest in the building affected.

No fee shall be charged for any original certificate applied for coincident with the application for a permit; for all other certificates, or for copies of any original certificates, there shall be a charge of one dollar ($1.00) each.

In new construction or construction of new buildings, a Certificate of Occupancy may be issued on satisfactory final inspection. In such cases, a request for final inspection may constitute a request for a Certificate of Occupancy.

Section 2.68. Special land use is a use of land for an activity which, under usual circumstances, would be detrimental to other land uses permitted within the same district but which is permitted because of circumstances unique to the location of the particular use and which use can be permitted conditionally without jeopardy to uses permitted within such district.

Section 2.69 Special Land Use Permit — An authorization by the City Council or Planning Commission specified herein to use a parcel of land and/or structure for a special land use.

Section 22.14 PROCEDURES FOR SPECIAL LAND USE APPROVAL.

A. An application for the approval of a special land use permit shall be made by the landowner and occupant of the land on which the special land use is to be located, to the Commission accompanied by the necessary fees and documents as prescribed by the Commission.

B. Upon receipt of an application for a special land use permit, except for those uses provided in Section 14.02 of this Ordinance, the Planning Commission shall review the application and required site plan for conformity with the required ordinance. The Planning Commission shall hold a public hearing at which time the application shall be considered. The public hearing shall be conducted pursuant to the procedure established in Section 4a, Act 207, Public Acts of Michigan 1921, as amended.

Upon receipt of an application for a special land use permit for any use provided for in Section 14.02 of this Ordinance, the Planning Commission shall hold a public hearing and review the application and required site plan for conformity with required ordinance and forward a recommendation regarding same to the City Council for approval.

Section 14.02 — Warren Zoning Ordinance

1. The Special Use Permit shall only be approved if the following general standards are satisfied:

a) The proposed use be compatible with adjacent uses of land;

b) The proposed use be in compliance with the standards of this Ordinance and the conditions imposed thereunder;

c) The proposed use be compatible with the natural environment;

d) The proposed use be compatible with the capacities of public services and facilities affected by the proposed use; and;

e) The proposed use be consistent with the public health, safety and welfare of the City.

2. The approving authority may deny, approve, or approve with conditions, a request for special land use permit. The approving authority may require reasonable conditions regarding the location, character, and other features of the proposed use as it is deemed necessary to satisfy the general standards provided herein.

3. Any conditions required for approval of a special land use may include conditions necessary to insure that the public services and facilities affected by a proposed land use or activity will be capable of accommodating increased service and facility loads caused by the land use or activity, to protect the natural environment and conserve natural resources and energy, to insure compatibility with adjacent uses of land, and to promote manner. Conditions imposed shall satisfy the following:

a) Be designed to protect natural resources, the health, safety and welfare and the social and economic well being of those who will use the land

use or activity under consideration, residents and landowners immediately adjacent to the proposed land use or activity, and the City as a whole.

b) Be related to the valid exercise of the police power, and purposes which are affected by the proposed use or activity.

c) Be necessary to meet the Intent and Purpose of this Ordinance, be related to the standards established in this Ordinance for the land use or activity under consideration, and be necessary to insure compliance with those standards.

4. The conditions imposed with respect to the approval of a land use permit shall be recorded in the record of the approval action, and shall remain unchanged except upon the mutual consent of the approving authority and the landowner and occupant. The approving authority shall maintain a record of conditions which are changed.

Supreme Court, U.S.
FILED
OCT 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-353

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHIGAN DIVERSIFIED BUSINESS PRODUCTS, INC., and MICHIGAN DIVERSIFIED BUSINESS CORP., d/b/a DANISH ADULT NEWS, d/b/a MEL-O-DEE RECORDS AND TAPES,

Appellants,

vs.

CITY OF WARREN, GEORGE O. BRUGGEMAN and PATRICK J. SANKEUR,

Appellees.

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS

BRIEF OPPOSING MOTION TO DISMISS

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INDEX

	PAGE
Brief opposing motion to dismiss	1
Statement	1
Argument	3
Conclusion	6

CITATIONS

Cases

Bates v. Coe, 98 U.S. 31 (1878)	3
Bell v. Bruen, 42 U.S. 169, 1 How. 169 (1843)	3
Canal & C.S.R. Co. v. Hart, 114 U.S. 654, 5 S.Ct. 1127 (1885)	3
Morrill v. Jones, 106 U.S. 466, 1 S.Ct. 423 (1883)	3
United States v. Donnelly's Estate, 397 U.S. 286, 90 S.Ct. 1033 (1970)	3

Ordinance

City of Warren Zoning Ordinance: Section 14.02	3-4

Federal Law

28 U.S.C. § 1257(2)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHIGAN DIVERSIFIED BUSINESS PRODUCTS, INC., and MICHIGAN DIVERSIFIED BUSINESS CORP., d/b/a DANISH ADULT NEWS, d/b/a MEL-O-DEE RECORDS AND TAPES,

Appellants,

vs.

CITY OF WARREN, GEORGE O. BRUGGEMAN and PATRICK J. SANKEUR,

Appellees.

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS

BRIEF OPPOSING MOTION TO DISMISS

Appellants, pursuant to Supreme Court Rule 16.5, submit this brief in opposition of the Motion to Dismiss submitted by Appellees, dated October 2, 1985.

STATEMENT

Appellants, in their Jurisdictional Statement, presented the following question to this Court:

> "Whether a municipality may regulate the location and operation of First Amendment protected businesses by

> requiring that special use approval be made prior to operation of such a business, and if so whether the standards set forth in the City of Warren's Zoning Ordinance, Sections 14.02, 20.07 and 21.06 sufficiently guide the special use decision making authority under the First and Fourteenth Amendments of the Constitution of the United States in ruling on special use applications by First Amendment protected businesses."

In response to Appellants' Jurisdictional Statement, Appellees submitted a Motion to Dismiss. As argued below, Appellees contentions are without merit.

ARGUMENT

Appellees are barred from raising their first argument—that Appellants' alleged non-compliance with the locational requirements necessary for site plan approval leaves Appellants without standing to challenge the special use law—because Appellees failed to previously raise this alleged defense at both the trial and appellate court levels. In *United States v. Donnelly's Estate*, 397 U.S. 286, 90 S.Ct. 1033 (1970) the Court refused to consider a defense which was not considered by the trial court or the appellate court. The rule that a defense cannot be made for the first time in the appellate court is well-established and indisputable. *See, Canal & C.S.R. Co. v. Hart*, 114 U.S. 654, 5 S.Ct. 1127 (1885); *Morrill v. Jones*, 106 U.S. 466, 1 S.Ct. 423 (1883); *Bates v. Coe*, 98 U.S. 31 (1878); *Bell v. Bruen*, 42 U.S. 169, 1 How. 169 (1843).

That this defense was not previously raised is apparent from examining the trial court and appellate court decisions, found in the appendix to Appellants' Jurisdiction Statement at pp. 27a and 1a, respectively. Since a court will not rule on constitutional grounds if a non-constitutional basis for ruling is present, the trial court and appellate court would be expected to at least discuss a non-constitutional defense raised by one of the parties. However, no such discussion, even in passing, is present in either the trial court or appellate court opinions. In addition, Appellants' brief to the Michigan Supreme Court noted that Appellees had not raised the issue of non-compliance with the site plan provisions. The relevant passage states that:

> "The City of Warren has not argued in this case that the Danish News Company violates these spatial criteria [as found in Section 14.02(c)(2)]—and, in addition, counsel for the City of Warren cannot, with any degree of sincerity, even tell this Court how the measurements are made, with City officials themselves being in sharp disagreement."

Appellants Brief to the Michigan Supreme Court at p. 17, n.9. Yet now, for the first time in this case, Appellees claim (without

the Court having benefit of the record) that (1) Appellants property is located within 100 feet of property zoned residential, and (2) non-compliance with the site plan locational requirements removes Appellants' standing to challenge the special use law. Appellees' Motion to Dismiss at pp. 4-5. Having failed to previously raise these issues, Appellees are barred from herein asserting the defense of lack of standing.

Additionally, Appellees' asserted defense of lack of standing fails as a matter of law. Section 14.02 is a special use ordinance, as contrasted to a pure zoning ordinance. That is, the operative element necessary for the lawful operation of an adult business is the obtaining of special use approval, rather than simply locating in certain designated areas. The site plan provision is merely a subpart of the special use scheme; site plan approval has no independent significance apart from its being a hill which must be climbed before special use approval can be obtained. Thus a finding that Warren's special use law is unconstitutional necessarily renders the site plan provision meaningless. A business cannot be required to obtain site plan approval so as to qualify for consideration as a special use when the special use provision is found unconstitutional (and hence void ab initio). Therefore, compliance with the site plan locational requirements is not a prerequisite for standing to challenge the special use law, since the site plan provision is not an independent law, but rather is merely a part of the special use procedure, which procedure is being attacked as a whole. If Warren's special use procedure is held unconstitutional, Appellants will not be required to obtain site plan approval, since whether such approval is obtained or not has no meaning aside from its place in the special use procedure. Thus whether Appellants currently qualify for site plan approval is irrelevant.

Appellees' second argument in support of their motion to dismiss questions the ripeness of this appeal. However, no authority is cited for their novel position that a second independent action brought by different parties challenging a law previously attacked in another, separate action somehow di-

vests the Supreme Court from considering an appeal in the first action. The present action is clearly ripe for review; it has proceeded through the channels of the legal system to the point where, under 28 U.S.C. § 1257(2) the right of appeal to this Court exists. Surely the Supreme Court need not await the decision of a lower court which by happenstance is considering the same law presented for resolution to the Supreme Court. The only possible effect the lower court's decision may have on this Court is if the district court rules against the constitutionality of the ordinance since then a conflict would result between the state and federal courts which may militate in favor of noting jurisdiction of this appeal. In short this appeal is ripe for review, and the fact that another court may be considering the constitutionality of the same law in issue in this appeal does not unripen this appeal.

CONCLUSION

For these reasons, this Court should deny Appellees' Motion to Dismiss, and instead should note probable jurisdiction of this appeal.

Respectfully submitted,

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